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UNITED STATES REPORTS

VOLUME 477

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1985

JUNE 18 THROUGH JUNE 27, 1986

HENRY C. LIND
REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
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ERRATA

395 U. S. 402, lines 19 and 24: "*Mateo*" should be "*Matteo*".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.

OFFICERS OF THE COURT

EDWIN MEESE III, Attorney General.
CHARLES FRIED, Solicitor General.
JOSEPH F. SPANIOL, Jr., Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
STEPHEN G. MARGETON, Librarian.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *it is ordered* that the Chief Justice be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1985

WARDAIR CANADA INC. *v.* FLORIDA DEPARTMENT OF REVENUE

APPEAL FROM THE SUPREME COURT OF FLORIDA

No. 84-902. Argued March 31, 1986—Decided June 18, 1986

During the time period in question, Florida law imposed a tax on all aviation fuel sold within the State to airlines regardless of whether the fuel was used to fly within or without the State, or whether the airline engaged in a substantial or a nominal amount of business within the State. Shortly after the law was enacted, appellant, a Canadian airline that operates charter flights to and from the United States, filed a state-court action attacking the law's validity insofar as it authorized assessment of a tax on fuel used by foreign airlines exclusively in foreign commerce. Granting injunctive relief, the trial court held that an agreement between Canada and the United States expressed a "federal policy" to exempt foreign airlines from fuel taxes and precluded individual States from acting in such area. The Florida Supreme Court reversed in part, holding that the agreement did not pre-empt state sales taxes, and that the Florida tax was not invalid under the Foreign Commerce Clause of the Federal Constitution.

Held:

1. The Federal Aviation Act does not occupy the field of international aviation, and thus does not pre-empt all state regulation. Where a federal statute does not expressly declare that state law is pre-empted, and where there is no actual conflict between what federal and state law prescribe, there must be evidence of a congressional intent to pre-empt the specific field covered by the state law. In the present case, not only is there no indication that Congress wished to preclude state sales taxation

of airline fuel, but, to the contrary, the Federal Aviation Act expressly permits States to impose such taxes. Pp. 5–7.

2. The Florida tax does not violate the dormant Foreign Commerce Clause on the ground that the tax threatens the ability of the Federal Government to speak with one voice with respect to the asserted federal policy of reciprocal tax exemptions for aircraft, equipment, and supplies, including aviation fuel, that constitute the instrumentalities of international air traffic. The evidence relied upon for such contention fails to reveal any such federal policy. Moreover, the evidence shows the absence of the sort of federal governmental silence that triggers dormant Commerce Clause analysis. The numerous international documents cited, including the agreement referred to in the courts below, show that while there appears to be an international *aspiration* on the one hand to eliminate all impediments to foreign air travel—including taxation of fuel—the *law* as it presently stands acquiesces in taxation of the sale of that fuel by political subdivisions of countries. Although most of the cited bilateral agreements explicitly commit the United States to refrain from imposing *national* taxes on aviation fuel used by airlines of the other contracting party, none of the agreements explicitly interdict state or local taxes on aviation fuel used by foreign airlines in international traffic. The facts presented by this case show that the Federal Government has affirmatively decided to permit the States to impose sales taxes on aviation fuel. Pp. 7–13.

455 So. 2d 326, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BURGER, C. J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 13. BLACKMUN, J., filed a dissenting opinion, *post*, p. 18.

Walter D. Hansen argued the cause and filed briefs for appellant.

Albert G. Lauber, Jr., argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried, Deputy Solicitor General Wallace, Abraham D. Sofaer*, and *Jim J. Marquez*.

Joseph C. Mellichamp III, Assistant Attorney General of Florida, argued the cause for appellee. With him on the briefs were *Jim Smith*, Attorney General, *Mitchell D. Franks*, *William Townsend*, and *Stephen Keller*.*

JUSTICE BRENNAN delivered the opinion of the Court.

Appellant Wardair Canada Inc., a Canadian airline that operates charter flights to and from the United States, maintains in this action that the Commerce Clause[1] of the Constitution precludes Florida from applying to it a tax on aviation fuel purchased in that State. Wardair also asserts that the Florida tax must fall because it violates a "clear unequivocal directive of Congress," allegedly implicit in the Federal Aviation Act, 49 U. S. C. App. § 1301 *et seq.* (1982 ed. and Supp. II), that the Federal Government has exclusive regulatory power over foreign air commerce. Brief for Appellant v, 15.

We disagree with appellant's view and analysis of the operation of the Commerce Clause, and find that Congress has not acted to pre-empt state taxes such as that imposed by Florida. Accordingly, we affirm the judgment of the Supreme Court of Florida upholding the tax.

I

Florida has for many years taxed the sale of fuel to common carriers, including airlines, within the State. Prior to April 1, 1983, the tax was prorated on a mileage basis, so that a carrier was liable for only the portion of the otherwise payable tax that was equal to the ratio of its Florida mileage to its worldwide mileage for the previous fiscal year. Fla. Stat. § 212.08 (4) (1975). Effective April 1, 1983, the Florida

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**Robert D. Papkin* filed a brief for Aer Lingus et al. as *amici curiae* urging reversal.

Benna Ruth Solomon and *H. Bartow Farr III* filed a brief for the National Governors' Association et al. as *amici curiae* urging affirmance.

Thomas W. Lager and *Morton H. Silver* filed a brief for Air Jamaica Ltd. et al. as *amici curiae*.

[1] The Constitution provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3.

law was amended to repeal the mileage proration formula for airlines, and the fuel tax was established at a rate of 5% on a deemed price of $1.148 per gallon. Fla. Stat. § 212.08 (4)(a)(2) (1985).[2] Under the amended law, an airline was liable for the full amount of the fuel tax whether that fuel was used to fly within or without the State, and regardless of whether the airline engaged in a substantial or a nominal amount of business within the State. The effect of this amendment was, of course, to increase substantially the tax liability of airlines, such as foreign airlines, who fly largely outside of Florida, and who had, under the old scheme, paid little Florida tax on fuel.

Shortly after the new law was enacted, appellant filed suit in state court attacking its validity insofar as it authorized the assessment and collection of a tax on fuel used by foreign airlines exclusively in foreign commerce. Wardair argued, among other things, that the law was unconstitutional under the Commerce Clause and that it was inconsistent with the Nonscheduled Air Services Agreement, May 8, 1974, United States-Canada, Art. XII, 25 U. S. T. 787, T. I. A. S. No. 7826 (U. S.-Canadian Agreement or Agreement), a bilateral agreement between the Governments of Canada and the United States regulating air charter service between the two countries. Wardair's case was consolidated for trial with a similar suit brought by a number of other foreign airlines.

In a separate order addressing only Wardair's claims, the trial court rejected the Commerce Clause arguments but found that the U. S.-Canadian Agreement expressed a "federal policy" to exempt foreign airlines from fuel taxes. The court further found that this "policy" precluded the individual States from acting in this area and thus preventing the

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[2] Florida has since substantially amended its statute which imposes taxes on aviation fuel. Those amendments, which became effective July 1, 1985, do not in any way bear on the present controversy, which concerns only appellant's tax liability from April 1, 1983, to July 1, 1985.

United States from "speaking with one voice" with respect to foreign commerce. In reaching this conclusion, the court relied largely on our decision in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434 (1979). The court granted appellant a permanent injunction against the Florida Department of Revenue from assessing and collecting the fuel tax from Wardair.

The case was certified to the Supreme Court of Florida, which reversed, in part, the trial court. 455 So. 2d 326 (1984). The Supreme Court first noted that the U. S.-Canadian Agreement by its terms exempted carriers only from national, as opposed to state or local (or, in the case of Canada, provincial) excise taxes, inspection fees, and other charges, and thus held that the Agreement did not pre-empt state sales taxes. Nor was the court persuaded that the Florida tax was invalid under the Foreign Commerce Clause. The court again referred to the fact that the Agreement exempted only national taxes, and "presume[d] this has been done intentionally." *Id.*, at 329. Having determined that the Federal Government had, in effect, itself elected not to prohibit the States from taxing aviation fuel, the court rejected the contention that the state tax "prevents our federal government from speaking with one voice," *ibid.*, and thus distinguished *Japan Line.* We noted probable jurisdiction, 474 U. S. 943 (1984), and now affirm.

II

Wardair suggests that by enacting the Federal Aviation Act (Act), Congress "left no room for local government participation" with respect to foreign air travel. Brief for Appellant 39. Appellant does not expressly label this a preemption argument; rather, it relies on metaphor and tells us that "in the field of foreign air commerce it is the Federal Government that calls the tune. It is the Federal Government that is the conductor of the music, deciding how it is to be played and who are the players." *Id.*, at 44. We assume that appellant intends, by this metaphor, to persuade us that Congress has determined to "occupy the field" of international aviation, and thus to pre-empt all state regulation. The argument is without merit.

It is of course true, as appellant notes, that Congress has, through the Act, regulated aviation extensively. The agencies charged by Congress with regulatory responsibility over foreign air travel exercise power, as appellant observes, over licensing, route services, rates and fares, tariffs, safety, and other aspects of air travel. However, state law is not preempted whenever there is any federal regulation of an activity or industry or area of law. The Supremacy Clause, among other things, confirms that when Congress legislates within the scope of its constitutionally granted powers, that legislation may displace state law, and this Court has throughout the years employed various verbal formulations in identifying numerous varieties of pre-emption. See, *e. g.*, *Louisiana Public Service Comm'n* v. *FCC*, 476 U. S. 355, 368–369 (1986). But we have consistently emphasized that the first and fundamental inquiry in any pre-emption analysis is whether Congress intended to displace state law, and where a congressional statute does not expressly declare that state law is to be pre-empted, and where there is no actual conflict between what federal law and state law prescribe, we have required that there be evidence of a congressional intent to pre-empt the specific field covered by the state law. *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190 (1983); *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238 (1984). In the present case, not only is there no indication that Congress wished to preclude state sales taxation of airline fuel, but, to the contrary, the Act expressly permits States to impose such taxes. Section 1113 of the Act, as added, 87 Stat. 90, and as amended, 49 U. S. C. App. § 1513, addresses the issue of "State taxation of air commerce," detailing in § 1113(a) the kinds of taxes which are prohibited and in § 1113(b) those which are permissible. Among the permissible taxes are "sales or use taxes on the sale of goods or services." It is, of course, plausible that Congress never considered whether States should be permitted to impose sales taxes on foreign, as opposed to domestic, carriers, and therefore we do not rely on the existence of this section to answer the Commerce Clause issue raised here by appellant and considered by us *infra*. However, this section of the Act does provide the complete response to appellant's pre-emption argument. For what § 1113(b) shows is that, to the degree that Congress considered the power of the States to tax air travel, it expressly and unequivocally permitted the States to exercise that authority. In other words, rather than prohibit state regulation in the area, Congress invited it. This is not the stuff of pre-emption.

III

In cases involving the so-called dormant Commerce Clause, both interstate and foreign, the Federal Government has not affirmatively acted, and it is the responsibility of the judiciary to determine whether action taken by state or local authorities unduly threatens the values the Commerce Clause was intended to serve. See *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 (1945). As we have previously observed: "The few simple words of the Commerce Clause . . . reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma*, 441 U. S. 322, 325–326 (1979). In recognition of the importance of this conviction, we have acknowledged the self-executing nature of the Commerce Clause and held on countless occasions that, even in the absence of specific action taken by the Federal Government to disapprove of state regulation implicating interstate or foreign commerce, state regulation that is contrary to the constitutional principle of ensuring that the conduct of individual States does not work to the detriment of the Nation as a whole, and thus ultimately to all of the States, may be invalid under the unexercised Commerce Clause. See *H. P. Hood & Sons, Inc.* v. *DuMond*, 336 U. S. 525 (1949); *Southern Pacific Co.* v. *Arizona*, *supra*. In the unique context of foreign commerce, we have alluded to the special need for federal uniformity: "'In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.' *Board of Trustees* v. *United States*, 289 U. S. 48, 59 (1933),'" *Japan Line*, 441 U. S., at 448. As in the context of cases alleging violations of the dormant Interstate Commerce Clause, the concern in these Foreign Commerce Clause cases is not with an actual conflict between state and federal law, but rather with the policy of uniformity, embodied in the Commerce Clause, which presumptively prevails when the Federal Government has remained silent.

When a state tax is challenged as violative of the dormant Interstate Commerce Clause, we have asked four questions: is the tax applied to an activity with a substantial nexus with the taxing State; is the tax fairly apportioned; does the tax discriminate against interstate commerce; and is the tax fairly related to the services provided by the State. *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279 (1977). In *Japan Line*, *supra*, we noted that when the state tax allegedly interferes with the Federal Government's authority to regulate foreign commerce, two additional questions must be asked: "first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign governments." *Id.*, at 451.

In the present case, appellant concedes that Florida's tax satisfies the four-part test set out in *Complete Auto*. In other words, it is not disputed that if this case did not involve foreign commerce, the Florida tax on the sale of aviation fuel would not contravene the Commerce Clause. Appellant also recognizes that there is no threat of multiple international taxation in this case, since the tax is imposed only upon the sale of fuel, a discrete transaction which occurs within one national jurisdiction only. Appellant and the United States as *amicus curiae* thus rely entirely on the final factor identified in *Japan Line*, and argue that the Florida tax violates the Foreign Commerce Clause because it threatens the ability of the Federal Government to "speak with one voice." Specifically, they urge that there exists a federal policy of reciprocal tax exemptions for aircraft, equipment, and supplies, including aviation fuel, that constitute the instrumentalities of international air traffic, and that this "policy" represents the statement that the "one voice" of the Federal Government wishes to make and which is threatened by the state law. We disagree. In our view, the evidence relied upon by appellant and the United States not only fails to reveal any such federal policy, but, even more fundamentally, shows also that in the context of this case we do not confront federal governmental silence of the sort that triggers dormant Commerce Clause analysis. On the contrary, the international agreements cited demonstrate that the Federal Government has affirmatively acted, rather than remained silent, with respect to the power of the States to tax aviation fuel, and thus that the case does not call for dormant Commerce Clause analysis at all. Moreover, in our view the actions taken by the Federal Government accept the authority of States to tax as Florida has here, and lend further support to the position and views advanced by appellee and relied on by the Florida Supreme Court in rejecting Wardair's arguments.

Appellant and the United States maintain that the policy of tax exemption for the instrumentalities of international air traffic is manifested by, among other things, (1) the Chicago Convention on International Civil Aviation, opened for signature, Dec. 7, 1944, 61 Stat. 1180 (Chicago Convention), an international convention to which the United States and 156 other nations, including Canada, are parties; (2) a Resolution (Resolution) adopted November 14, 1966, by the International Civil Aviation Organization (ICAO), an organization of which the United States is a member by virtue of being a party to the Chicago Convention; (3) more than 70 bilateral agreements, including the U. S.-Canadian Agreement, into which the United States has entered with various foreign countries dealing with international aviation. But what these documents show is that while there appears to be an international *aspiration* on the one hand to eliminate all impediments to foreign air travel—including taxation of fuel—the *law* as it presently stands acquiesces in taxation of the sale of that fuel by political subdivisions of countries. Thus, Article 24(a) of the Chicago Convention by its terms precludes the imposition of local taxes on fuel only when the fuel is "on board an aircraft . . . on arrival . . . and retained on board on leaving" a contracting party; it does not prohibit taxation of fuel purchased in that country. 61 Stat. 1186. We agree with *amici* National Governors' Association et al. that the negative implications of this provision support recognizing Florida's power to tax; certainly, the provision demonstrates the international community's awareness of the problem of state and local taxation of international air travel, specifically aviation fuel, and represents a decision by the parties to that Convention to address the problem by curtailing and limiting only some of the localities' power to tax, while implicitly preserving other aspects of that authority.

Nor does the Resolution provide support for appellant's contention that there is a clear national policy of exempting aviation fuel from state sales taxes. While the Resolution undeniably does endorse an international scheme whereby fuel would be exempt "'from all customs and other duties,'" which it defines as including "'import, export, excise, sales, consumption and internal duties and taxes of all kinds levied

. . . by any taxing authority within a State,'" Brief for United States as *Amicus Curiae* 12 (Sept. 17, 1985), quoting Resolution pp. 3, 4 (emphasis deleted), the Resolution is formally merely the work product of an international organization of which the United States is a member; it has not been specifically endorsed, let alone signed, entered into, agreed upon, approved, or passed by either the Executive or Legislative Branch of the Federal Government. In other words, no action has been taken to give the Resolution the force of law. While it is not argued by either appellant or by the United States as *amicus* that this Resolution in and of itself should operate to pre-empt state law, we also think it untenable to assert, as they do, that this Resolution represents a policy *of the United States*, as opposed to a policy of an organization of which the United States is one of many members.

Our reluctance in this regard is bolstered by the fact that the United States has, since the time that the Convention came into force, become a party to more than 70 bilateral aviation agreements, and in not one of these agreements has the United States agreed to deny the States the power asserted by Florida in this case. Most of these agreements explicitly commit the United States to refrain from imposing *national* taxes on aviation fuel used by airlines of the other contracting party, see Brief for United States as *Amicus Curiae* 14–17, 19, but as the United States concedes, "none of our bilateral aviation agreements explicitly interdicts state or local taxes on aviation fuel used by foreign airlines in international traffic." *Id.*, at 17. Most strikingly as it relates to the case before us, the U. S.-Canadian Agreement itself limits the tax exemption to be afforded to foreign air carriers to "national duties and charges." App. A–58. Taxation by political subdivisions of either the United States or Canada are not mentioned, an omission which must be understood as representing a policy choice by the contracting parties, especially in light of the fact that the Resolution addressed this concern eight years before the United States and Canada entered into the Agreement. We note that throughout the time that the U. S.-Canadian Agreement has been in force, some American States, as well as some Canadian Provinces, have imposed taxes within their jurisdictions on aviation fuel used by Canadian and American carriers respectively in international travel. Furthermore, there was not, until recently, any challenge to the localities' legal authority to do so. Although not dispositive, this course of conduct suggests that the parties to the Agreement and those most immediately affected by it understood it to permit this sort of taxation.

What all of this makes abundantly clear is that the Federal Government has not remained silent with regard to the question whether States should have the power to impose taxes on aviation fuel used by foreign carriers in international travel. By negative implication arising out of more than 70 agreements entered into since the Chicago Convention, the United States has at least acquiesced in state taxation of fuel used by foreign carriers in international travel. Again, in the U. S.-Canadian Agreement only "national" charges are barred, and we presume that drafters from two federalist nations understood this as representing a choice not to preclude local taxation. It would turn dormant Commerce Clause analysis entirely upside down to apply it where the Federal Government has acted, and to apply it in such a way as to *reverse* the policy that the Federal Government has elected to follow. For the dormant Commerce Clause, in both its interstate and foreign incarnations, only operates where the Federal Government has not spoken to ensure that the essential attributes of nationhood will not be jeopardized by States acting as independent economic actors. However, the Federal Government is entitled in its wisdom to act to permit the States varying degrees of regulatory authority. In our view, the facts presented by this case show that the Federal Government has affirmatively decided to permit the States to impose these sales taxes on aviation fuel. Accordingly, there is no need for us to consider, and nothing in this opinion should be understood to address, whether, in the absence of these international agreements, the Foreign Commerce Clause would invalidate Florida's tax.

In *Japan Line*, 441 U. S., at 451, we explained that Foreign Commerce Clause analysis requires that a court ask whether a state tax "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" But we never suggested in that case or any other that the Foreign Commerce Clause *insists* that the Federal Government speak with any particular voice.

In light of the above, the judgment of the Supreme Court of Florida is

Affirmed.

CHIEF JUSTICE BURGER, concurring in part and concurring in the judgment.

The Court acknowledges in its discussion in Part II concerning the scope of the Federal Aviation Act that "not only is there no indication that Congress wished to preclude state sales taxation of airline fuel, but, to the contrary, the Act expressly permits States to impose such taxes." *Ante*, at 6. That being so I see no reason for the discussion in Part III.

While 49 U. S. C. App. § 1513(a) describes a number of state taxes which are prohibited, § 1513(b) expressly permits state "sales or use taxes on the sale of goods or services." The fuel tax challenged here is plainly a "sales or use ta[x] on the sale of goods" within the language of § 1513(b).

Remarkably, the Court nevertheless refuses to "rely on the existence of this section to answer the Commerce Clause issue raised here" because it believes it is "plausible that Congress never considered whether States should be permitted to impose sales taxes on *foreign*, as opposed to domestic, carriers." *Ante*, at 7 (emphasis added). Accordingly, the Court continues with an extended discussion of "the so-called dormant Commerce Clause," which applies to cases involving areas where "the Federal Government has not affirmatively acted." *Ibid.* The plain language of § 1513(b) demonstrates, however, that there is *nothing* "dormant" here.

The conclusion the Court reaches in Part II is illuminated by the Court's curious failure to even mention any of the extensive legislative history or this Court's recent precedent concerning the enactment of § 1513, which followed our decision in *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines, Inc.*, 405 U. S. 707 (1972). In that case the Court upheld a $1-per-passenger "head tax" on all passengers boarding airplanes at the Evansville airport, after rejecting a Commerce Clause attack because the tax did not discriminate between interstate and intrastate commerce.

Congress reacted immediately to our decision by holding hearings on local taxation of air transportation. See Hearings on S. 2397 et al. before the Subcommittee on Aviation of the Senate Committee on Commerce, 92d Cong., 2d Sess., 129–198 (1972) (hereafter Senate Hearings); Hearings on H. R. 2337 et al. before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 92d Cong., 2d Sess. (1972) (hereafter House Hearings). The result of these hearings was the enactment of § 7(a) of the Airport Development Acceleration Act of 1973, see Pub. L. 93–44, § 7(a), 87 Stat. 90, which added § 1113 to the Federal Aviation Act, and which is now codified, as amended, at 49 U. S. C. App. § 1513.

We subsequently addressed the scope of § 1513(a)'s prohibition when confronted with Hawaii's state tax on the gross income of airlines operating within that State. See *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U. S. 7 (1983). Reviewing the legislative history, the Court pointed out that § 1513 was enacted out of congressional concern that "the proliferation of local taxes burdened interstate air transportation." *Id.*, at 9 (citing S. Rep. No. 93–12, pp. 17, 20–21 (1973), and H. R. Rep. No. 93–157, pp. 4–5 (1973)). We concluded unanimously that Hawaii's tax was expressly pre-empted by the plain language of § 1513(a), 464 U. S., at 11, emphasizing that

> "when a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is pre-empted." *Id.*, at 12 (footnote omitted).

In the course of our discussion of § 1513(a) we addressed the Hawaii Supreme Court's "professed confusion over the 'paradox' between § 1513(a)'s prohibition on certain state taxes on air transportation and § 1513(b)'s reservation of the States' primary sources of revenue, such as property taxes, net income taxes, franchise taxes, and sales or use taxes." *Id.*, at 12, n. 6. Our resolution of this "paradox" is enlightening:

> "We find no paradox between § 1513(a) and § 1513(b). Section 1513(a) pre-empts a limited number of state taxes, including gross receipts taxes imposed on the sale of air transportation or the carriage of persons traveling in air commerce. Section 1513(b) clarifies Congress' view that the States are still free to impose on airlines and air carriers 'taxes other than those enumerated in subsection (a),' such as property taxes, net income taxes, and franchise taxes. While neither the statute nor its legislative history explains exactly why Congress chose to distinguish between gross receipts taxes imposed on airlines and the taxes reserved in § 1513(b), the statute is quite clear that Congress chose to make the distinction, and the courts are obliged to honor this congressional choice." *Ibid.*

Careful review of the legislative history indicates that it is not entirely silent as to why Congress chose to make this particular distinction. The Senate's first proposal to limit state taxation would have prohibited *any* state tax—direct or indirect—on air transportation. S. 3611, 92d Cong., 2d Sess. (1972); see also H. R. 2337, 92d Cong., 1st Sess. (1971) (similar prohibition). The States, however, complained loudly at the hearings that this sweeping provision would prohibit even unobjectionable taxes such as landing fees, fuel taxes, and sales taxes on food provided to airline passengers. *E. g.*, House Hearings, at 91 (statement of John A. Nammack, Executive Vice President, National Association of State Aviation Officials). This broad interpretation was supported by officials from the Civil Aeronautics Board and the Federal Aviation Administration, who objected to any such broad prohibition because it would deprive local governments of funds necessary for maintenance of airports. Senate Hearings, at 138 (statement of Whitney Gillilland, Vice Chairman, CAB); *id.*, at 140–141 (statement of Ronald W. Pulling, Acting Associate Administrator for Plans, FAA). In reply, Members of Congress assured these officials that the prohibition was intended to apply only to "head taxes" and the like, and that some clarification of the bill's intent would be in order. *E. g.*, *id.*, at 138, 151, 157 (statements of Sen. Cannon). See also House Hearings, at 99 (statement of Rep. Dingell); *id.*, at 101 (statement of Rep. Harvey). The final bill enacting § 1513 therefore appears to be a compromise following careful consideration by Congress as to the permissible scope of state taxation in the area of air commerce.

Most relevant to the issue before us in this case is the fact that nowhere in that legislative history is there any indication that Congress intended to limit the applicability of § 1513(b) to state taxation of *interstate* air commerce while prohibiting taxation of *foreign* air commerce. To the contrary, Congress was fully aware that the bill would cover foreign air commerce, since both the State Department and the Senate's own Legislative Council advised Congress that "air commerce" as employed in the proposed bill encompassed foreign and overseas air commerce. See Senate Hearings, at 136 (letter of David M. Abshire, Department of State); *id.*, at 207 (memorandum of Peter W. LeRoux, Senior Counsel, Office of Legislative Council). Moreover, Congress discussed the effect of foreign "head taxes" if similar local taxes were barred. House Hearings, at 35–37.

The language of the Act bears this out. Section 1513(a)'s prohibition refers to certain taxes "on persons traveling in air commerce . . . or on the sale of air transportation." The Act defines "air commerce" as including "interstate, overseas, or foreign air commerce." 49 U. S. C. App. § 1301(4). Similarly, "air transportation" is defined as including "interstate, overseas, or foreign air transportation." § 1301(10). Under the plain language of § 1513, therefore, the Florida tax—even in the area of foreign air commerce—is expressly authorized by Congress.

Just as we need not look beyond the plain language "when a federal statute unambiguously *forbids* the States to impose a particular kind of tax on an industry affecting interstate commerce," *Aloha Airlines*, 464 U. S., at 12 (emphasis added), we need not look beyond the plain language of a federal statute which unambiguously *authorizes* the States to impose a particular kind of tax. Section 1513(b) authorizes state sales taxes on goods used in air commerce. While Congress has not explained exactly why it made the distinction between taxes prohibited under § 1513(a) and those permitted under § 1513(b), "Congress chose to make the distinction, and the courts are obliged to honor this congressional choice." 464 U. S., at 12, n. 6.

By refusing to decide this case solely on the express language of § 1513(b) and instead entering the cloudy waters of this Court's "dormant Commerce Clause" doctrine, the Court fails to honor the choice already pointedly made by Congress following its extensive consideration of the problem of state taxation in this area.

JUSTICE BLACKMUN, dissenting.

In *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434 (1979), this Court recognized that the Commerce Clause commits to the exclusive authority of the Federal Government the regulation of those aspects of foreign commerce that by their very nature "necessitate a uniform national rule." *Id.*, at 449. In regulating commercial relations with foreign governments, "'the Federal Government must speak with one voice.'" *Ibid.*, quoting *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276, 285 (1976). As a result, the Court in *Japan Line* held that the imposition of California's ad valorem property tax on foreign-owned containers used exclusively in foreign commerce was unconstitutional. The tax imposed in this case by Florida on fuel is indistinguishable, for Commerce Clause purposes, from the tax imposed by California on containers in *Japan Line*. Because a State's taxation on fuel used in foreign commerce will prohibit the Federal Government from speaking with "one voice," I believe that this application of Florida's tax violates the Constitution.

The Court, however, finds *Japan Line* inapposite, asserting that "we do not confront federal governmental silence of the sort that triggers dormant Commerce Clause analysis." *Ante*, at 9. To the Court, that the Federal Government has addressed some aspects of foreign aviation taxation, but has not expressly prohibited the imposition of state and local taxes, see *ante*, at 10–11, is a sufficient basis for upholding the tax at issue here. Apparently, the Court believes that once the Federal Government has spoken at all in an area, the Commerce Clause operates to permit States to act except if such action is expressly prohibited. But we have never permitted validation of state burdens on foreign commerce through this sort of implication.

For a state regulation to be removed from the reach of the dormant Commerce Clause, the intent of the Federal Government to permit state activity "must be unmistakably clear." *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U. S. 82, 91 (1984). And the "need for a consistent and coherent foreign policy, which is the exclusive responsibility of the Federal Government," heightens the need for affirmative approval. *Id.*, at 92, n. 7. The Court's holding today is based not on the presence of this requisite "affirmative approval"; rather, the Court relies on a "negative implication arising out of more than 70 agreements" that indicate that "the United States *has at least acquiesced*" in the kind of tax imposed here (emphasis added). *Ante*, at 12. Whether or not these agreements suggest acquiescence is beside the point; what is clear is that the Federal Government has not provided the affirmative approval required to permit States to act.

The Government's efforts in the international sphere reveal an overarching and coherent policy directed at the creation of reciprocal tax exemptions in the area of foreign aviation. The Nation's aviation relations with foreign governments are implemented through a comprehensive network of treaties, bilateral executive agreements, informal arrangements, and federal statutes. Although these provisions stop short of explicitly banning state levies on aircraft fuel used in foreign travel, the indisputable pattern that emerges is one of a policy of reciprocal tax exemptions for instrumentalities of international commerce, like the containers in *Japan Line* and the fuel at issue here. The Government's inability to date to achieve full international consent to reciprocal tax exclusions neither negates nor demonstrates the absence of federal policy; it simply means that the United States has not fully succeeded, as yet, in transforming its policy into law. Indeed, the "aspiration . . . to eliminate all impediments to foreign air travel" (emphasis deleted), recognized by the Court, *ante*, at 10, is precisely the federal policy that renders the application of Florida's tax to the fuel here unconstitutional.

The decision today leaves Florida and other States free to tax foreign aviation, and will hinder the United States in its efforts to attain reciprocal tax immunity with foreign governments. Florida's action may well undermine reciprocity agreements since other countries may react to Florida's tax with various retaliatory measures against United States carriers abroad, retaliation that "of necessity would be felt by the Nation as a whole." *Japan Line*, 441 U. S., at 453. Florida's actions may also hamper the United States' position in negotiations designed to achieve the federal policy of reciprocity because the Nation cannot speak with "one voice." In *Japan Line*, this Court made clear that a State, "by its unilateral act, cannot be permitted to place . . . impediments before this Nation's conduct of its foreign relations and its foreign trade." *Ibid.* Because the Court's decision today permits just that, I respectfully dissent.

SCHIAVONE ET AL. *v.* FORTUNE, AKA TIME, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-1839. Argued February 26, 1986—Decided June 18, 1986

Petitioners instituted diversity libel actions on May 9, 1983, by filing their respective complaints in the Federal District Court for the District of New Jersey. Each complaint alleged that the plaintiff was libeled in a story that appeared in the May 31, 1982, issue of Fortune magazine, and described Fortune as "a foreign corporation having its principal offices at Time and Life Building" in New York City. On May 20, the complaints were mailed to Time's registered agent in New Jersey, who received them on May 23 but refused service because Time was not named as a defendant. On July 19, 1983, each petitioner amended his complaint to name as the captioned defendant, and to refer in the body of the complaint to, "Fortune, also known as Time, Incorporated." The amended complaints were served on Time by certified mail on July 21. The District Court dismissed the complaints under the New Jersey statute of limitations, which requires a libel action to be commenced within one year of the publication of the alleged libel. The court held that, although the amended complaints adequately named Time as a defendant, the amendments did not relate back, under Federal Rule of Civil Procedure 15(c), to the filing of the original complaints because it had not been shown that Time received notice of the institution of the actions within the period provided by New Jersey law. On consolidated appeals, the Court of Appeals affirmed.

Held: The actions were properly dismissed. Pp. 27-32.

(a) Even if this Court adopted the "identity-of-interest" exception under which an amendment that substitutes a related party in a complaint after the limitations period has expired will relate back to the date the original complaint was filed, the facts of this case do not fall within that exception. Neither Fortune nor Time received notice of the filing until after the limitations period had run, and thus there was not proper notice to Fortune that could be imputed to Time. Pp. 27-29.

(b) The July 1983 amendments to the complaints did not relate back to the May 9 filing. Under Rule 15(c) relation back is dependent upon four factors, all of which must be satisfied. Notice to Time and the necessary knowledge did not come into being "within the period provided by law for commencing an action against" Time as required by Rule 15(c).

That occurred only after expiration of the applicable 1-year period. Pp. 29–32.

750 F. 2d 15, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE, J., joined, *post*, p. 32.

Morris M. Schnitzer argued the cause for petitioners. With him on the briefs were *Theodore W. Geiser* and *Thomas S. Cosma*.

Peter G. Banta argued the cause and filed a brief for respondent.

JUSTICE BLACKMUN delivered the opinion of the Court.

This case primarily concerns Rule 15(c) of the Federal Rules of Civil Procedure and its application to a less-than-precise denomination of a defendant in complaints filed in federal court near the expiration of the period of limitations. Because of an apparent conflict among the Courts of Appeals,[1] we granted certiorari. 474 U. S. 814 (1985).

I

The three petitioners instituted this diversity litigation on May 9, 1983, by filing their respective complaints in the United States District Court for the District of New Jersey. Each complaint alleged that the plaintiff was libeled in a cover story entitled "The Charges Against Reagan's Labor Secretary," which appeared in the May 31, 1982, issue of Fortune magazine. The caption of each complaint named

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[1] Compare, *e. g., Cooper* v. *U. S. Postal Service*, 740 F. 2d 714, 716 (CA9 1984), cert. denied, 471 U. S. 1022 (1985); *Watson* v. *Unipress, Inc.*, 733 F. 2d 1386, 1390 (CA10 1984); *Hughes* v. *United States*, 701 F. 2d 56, 58 (CA7 1982); and *Trace X Chemical, Inc.* v. *Gulf Oil Chemical Co.*, 724 F. 2d 68, 70–71 (CA8 1983), with *Kirk* v. *Cronvich*, 629 F. 2d 404, 408 (CA5 1980); *Ingram* v. *Kumar*, 585 F. 2d 566, 571–572 (CA2 1978), cert. denied, 440 U. S. 940 (1979); and *Ringrose* v. *Engelberg Huller Co.*, 692 F. 2d 403, 410 (CA6 1982) (concurring opinion).

"Fortune," without embellishment, as the defendant. See App. 8a. In its paragraph 2, each complaint described Fortune as "a foreign corporation having its principal offices at Time and Life Building, Sixth Avenue and 50th Street, New York, New York 10020." *Id.*, at 9a. "Fortune," however, is only a trademark and the name of an internal division of Time, Incorporated (Time), a New York corporation.[2]

On May 20, petitioners' counsel mailed the complaints to Time's registered agent in New Jersey. They were received on May 23. The agent refused service because Time was not named as a defendant.

On July 18, 1983, each petitioner amended his complaint to name as the captioned defendant "Fortune, also known as Time, Incorporated," and, in the body of the complaint, to refer to "Fortune, also known as Time, Incorporated," as a New York corporation with a specified registered New Jersey agent. See *id.*, at 25a, 26a. The amended complaints were served on Time by certified mail on July 21.

Time moved to dismiss the amended complaints. The District Court granted those motions. *Id.*, at 96a, 98a, 100a. It ruled that the complaints, as amended, adequately named Time as a defendant, and therefore were not to be dismissed "for failure of capacity of defendant to be sued." Supp. App. to Pet. for Cert. 18a. Under New Jersey law, however, see N. J. Stat. Ann. 2A:14-3 (West 1952), a libel action must be commenced within one year of the publication of the alleged libel.[3] Supp. App. to Pet. for Cert. 18a. State law also provides that the "'date upon which a substantial distribution occurs triggers the statute of limitations for any and all actions arising out of that publication,'" *id.*, at 19a, quoting *MacDonald* v. *Time, Inc.*, Civil No. 81-479 (DNJ Aug. 25,

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[2] No claim is made that Fortune is a separate legal entity with the capacity to be sued.

[3] The cited New Jersey statute reads:

"Every action at law for libel or slander shall be commenced within 1 year next after the publication of the alleged libel or slander."

1981). Supp. App. to Pet. for Cert. 19a.[4] The court found it unnecessary, for purposes of the motion, to determine the precise date the statute of limitations had begun to run.

Although Time acknowledged that the original filings were within the limitations period, it took the position that it could not be named as a party after the period had expired. Time contended that a party must be substituted within the limitations period in order for the amendment to relate back to the original filing date pursuant to Rule 15(c).[5]

The District Court concluded that the amendments to the complaints did not relate back to the filing of the original complaints because it had not been shown that Time received notice of the institution of the suits within the period provided by law for commencing an action against it. Supp. App. to Pet. for Cert. 23a. It therefore "with great reluctance" granted the motion to dismiss, noting that any dismissal of a claim based upon the statute of limitations "by its very nature is arbitrary." *Id.*, at 24a. The court also ruled that the "equities of this situation" did not demand that relief be afforded to petitioners. *Ibid.* The identity of the publisher of Fortune was readily ascertainable from the magazine itself. It rejected petitioners' contention that Time deliberately misled them to believe that Fortune was a separate corporation. It observed that petitioners created the risk by filing their suits close to the end of the limitations period. *Id.*, at 25a.

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[4] The court noted that, despite the magazine's cover date of May 31, 1982, the record "indicate[d]" that, for purposes of determining the limitations period, publication "occurred substantially before" May 31; that subscription copies were mailed May 12 and received by subscribers May 13–19; that newsstand copies went on sale May 17; that a press release was issued May 11; and that copies of the magazine were mailed to representatives of the press on that date. Supp. App. to Pet. for Cert. 19a.

[5] Rule 15(c) provides in pertinent part:

"Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him."

Petitioners moved for reconsideration. By letter opinion filed January 12, 1984, the court adhered to its prior ruling. App. to Brief in Opposition 1a.

On appeal to the United States Court of Appeals for the Third Circuit, the three actions were consolidated. That court affirmed the orders of the District Court. 750 F. 2d 15 (1984). It ruled that the New Jersey statute of limitations ran "on May 19, 1983, at the latest," for a "substantial distribution" of the issue of May 31, 1982, had "occurred on May 19, 1982, at the latest." *Id.*, at 16. It regarded the language of Rule 15(c) as "clear and unequivocal." 750 F. 2d, at 18. It also said: "While we are sympathetic to plaintiffs' arguments, we agree with the defendant that it is not this court's role to amend procedural rules in accordance with our own policy preferences." *Ibid.* It further held that the period within which the defendant to be brought in must receive notice under Rule 15(c) does not include the time available for service of process.

II

It is clear, from what has been noted above, that the three complaints as originally drawn were filed within the limitations period; that service was attempted only after that period had expired; and that the amendment of the complaints, and the service of the complaints as so amended, also necessarily took place after the expiration of the limitations period. The District Court and the Court of Appeals so found, and we have no reason to disagree. The parties themselves do not dispute these facts. Instead, their dispute centers on whether Time was sufficiently named as the defendant in the original complaints so that the service that was attempted after the 1-year period but within the time allowed for service was effective, and on whether, in any event, the amendment of the complaints related back to the original filing and accomplished the same result.

Petitioners argue that Rule 15(c)'s present form came into being by amendment in 1966 for the express purpose of allowing relation back of a change in the name or identity of a defendant when, although the limitations period for filing had run, the period allowed by Rule 4 for timely service had not yet expired. Brief for Petitioners 5. The Rule was effected, it is said, to ameliorate literal and rigid application of limitations periods to both claim and party amendments. It is urged that the Rules of Civil Procedure should be applied and construed to yield just determinations, that is, determinations on the merits, and that a procedural "double standard" that bars relation back for late notice to a new defendant when a like notice to the original defendant would be timely is unacceptable. Petitioners further argue that the original party named here and the party sought to be substituted had such commonality of interest that notice to one was in fact notice to the other. Therefore, it is said, where the intended defendant was misdesignated in form only, and knew or reasonably should have known that it was the true target and received the same notice it would have received had the form been flawless, "relation back should be a foregone conclusion." Brief for Petitioners 6.

Respondent, of course, takes issue with this approach. It claims that the language of Rule 15(c) is clear and that proper notice of the institution of these actions was not received by it within the period of limitations. It asserts that the equities do not support petitioners' position, and that the interpretation of Rule 15(c) urged by petitioners in effect would be an impermissible rewriting of the Rule by this Court.

III

As amended, Rule 1 of the Federal Rules of Civil Procedure states: "These rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action." Rule 8(f) says: "All pleadings shall be so construed as to do substantial justice." And Justice Black reminded us, more than 30 years ago, in connection with an order adopting revised Rules of this Court, that the "principal function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts." 346 U. S. 945, 946 (1954).

This Court, too, in the early days of the federal civil procedure rules, when Rule 15(c), see n. 5, *supra*, consisted only of what is now its first sentence, announced that the spirit and inclination of the rules favored decisions on the merits, and rejected an approach that pleading is a game of skill in which one misstep may be decisive. *Conley* v. *Gibson*, 355 U. S. 41, 48 (1957). It also said that decisions on the merits are not to be avoided on the basis of "mere technicalities." *Foman* v. *Davis*, 371 U. S. 178, 181 (1962).

Despite these worthy goals and loftily stated purposes, we conclude that the judgments of the Court of Appeals in the present cases were correct.

A

The defendant named in the caption of each of the original complaints was "Fortune," and Fortune was described in the body of the complaint as "a foreign corporation" having principal offices in the Time and Life Building in New York City. It also was alleged that Fortune was engaged in the publication of a magazine of that name. Attached to the complaint were a copy of the magazine's cover for its issue of May 31, 1982, an artist's depiction of an alleged payoff, and the text of parts of the article about which petitioners complained. The focus, as pleaded, was on Fortune.

We cannot understand why, in litigation of this asserted magnitude, Time was not named specifically as the defendant in the caption and in the body of each complaint. This was not a situation where the ascertainment of the defendant's identity was difficult for the plaintiffs. An examination of the magazine's masthead clearly would have revealed the corporate entity responsible for the publication.[6]

Petitioners nonetheless rely on Fortune's status as a division of Time to argue that institution of an action purportedly against the former constituted notice of the action to the latter, as a related entity. Some Courts of Appeals have recognized an "identity-of-interest" exception under which an amendment that substitutes a party in a complaint after the limitations period has expired will relate back to the date of the filing of the original complaint.[7] The Court of Appeals in this case rejected that approach. The object of the exception is to avoid the application of the statute of limitations when no prejudice would result to the party sought to be added.

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[6] The magazine's very issue in question, that of May 31, 1982, p. 2, recites:

"FORTUNE (ISSN 0015-8259), May 31, 1982, Vol. 105, No. 11. Issued biweekly by Time Inc., 3435 Wilshire Blvd., Los Angeles, Cal. 90010. . . . Principal offices: Time & Life Building, Rockefeller Center, New York, N. Y. 10020. . . . FORTUNE is a registered mark of Time Incorporated."

The parallel information set forth in current issues of Fortune magazine reads:

"FORTUNE (ISSN 0015-8259). Published biweekly, with three issues in October, by Time Inc., 10880 Wilshire Blvd., Los Angeles, CA 90024-4193. Time Inc. principal office: Time & Life Building, Rockefeller Center, New York, NY 10020-1393. . . . FORTUNE is a registered mark of Time Inc."

See issue of June 9, 1986, p. 2; issue of May 26, 1986, p. 4; issue of May 12, 1986, p. 4.

[7] See, *e. g.*, *Travelers Indemnity Co.* v. *United States ex rel. Construction Specialties Co.*, 382 F. 2d 103 (CA10 1967); *Montalvo* v. *Tower Life Building*, 426 F. 2d 1135 (CA5 1970); *Korn* v. *Royal Caribbean Cruise Line, Inc.*, 724 F. 2d 1397 (CA9 1984).

Even if we were to adopt the identity-of-interest exception, and even if Fortune properly could be named as a defendant, we would be compelled to reject petitioners' contention that the facts of this case fall within the exception. Timely filing of a complaint, and notice within the limitations period to the party named in the complaint, permit imputation of notice to a subsequently named and sufficiently related party. In this case, however, neither Fortune nor Time received notice of the filing until after the period of limitations had run. Thus, there was no proper notice to Fortune that could be imputed to Time. See *Hernandez Jimenez* v. *Calero Toledo*, 604 F. 2d 99, 102–103 (CA1 1979); *Norton* v. *International Harvester Co.*, 627 F. 2d 18, 20–21 (CA7 1980).

B

The complaints as they were amended, of course, meet the identification standard. While the statement, "Fortune, also known as Time, Incorporated, was and is a corporation of the state of New York," is not a model of accuracy, it does focus on Time and sufficiently describes Time as the targeted defendant. The next question, then, is whether the amendment, made in July 1983, related back to the filing on May 9, a date concededly within the period of the applicable New Jersey statute of limitations.

Central to the resolution of this issue is the language of Rule 15(c). See n. 5, *supra*. Relation back is dependent upon four factors, all of which must be satisfied: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period. We are not concerned here with the first factor, but we are concerned with the satisfaction of the remaining three.

The first intimation that Time had of the institution and maintenance of the three suits took place after May 19, 1983, the date the Court of Appeals said the statute ran "at the latest." 750 F. 2d, at 16. Only on May 20 did petitioners' counsel mail the complaints to Time's registered agent in New Jersey. Only on May 23 were those complaints received by the registered agent, and then refused. Only on July 19 did each petitioner amend his complaint. And only on July 21 were the amended complaints served on Time.

It seems to us inevitably to follow that notice to Time and the necessary knowledge did not come into being "within the period provided by law for commencing the action against" Time, as is so clearly required by Rule 15(c). That occurred only after the expiration of the applicable 1-year period. This is fatal, then, to petitioners' litigation.

We do not have before us a choice between a "liberal" approach toward Rule 15(c), on the one hand, and a "technical" interpretation of the Rule, on the other hand. The choice, instead, is between recognizing or ignoring what the Rule provides in plain language. We accept the Rule as meaning what it says.

We are not inclined, either, to temper the plain meaning of the language by engrafting upon it an extension of the limitations period equal to the asserted reasonable time, inferred from Rule 4, for the service of a timely filed complaint. Rule 4 deals only with process. Rule 3 concerns the "commencement" of a civil action. Under Rule 15(c), the emphasis is upon "the period provided by law for commencing the action against" the defendant. An action is commenced by the filing of a complaint and, so far as Time is concerned, no complaint against it was filed on or prior to May 19, 1983.

Any possible doubt about this should have been dispelled 20 years ago by the Advisory Committee's 1966 Note about Rule 15(c). The Note specifically states that the Rule's phrase "within the period provided by law for commencing the action" means "within the applicable limitations period":

> "An amendment changing the party against whom a claim is asserted relates back if the amendment satisfies the usual condition of Rule 15(c) of 'arising out of the conduct . . . set forth . . . in the original pleading,' and if, *within the applicable limitations period*, the party brought in by amendment, first, received such notice of the institution of the action—the notice need not be formal—that he would not be prejudiced in defending the action, and, second, knew or should have known that the action would have been brought against him initially had there not been a mistake concerning the identity of the proper party" (emphasis supplied). Advisory Committee's Notes on Fed. Rule Civ. Proc. 15, 28 U. S. C. App., p. 551; 39 F. R. D. 83.

Although the Advisory Committee's comments do not foreclose judicial consideration of the Rule's validity and meaning, the construction given by the Committee is "of weight." *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438, 444 (1946).

The commentators have accepted the literal meaning of the significant phrase in Rule 15(c) and have agreed with the Advisory Committee's Note. See 3 J. Moore, Federal Practice § 15.15[4.-2], p. 15-225 (2d ed. 1985) ("the Rule demands a showing that, within the period of limitations, the new party . . ."); 6 C. Wright & A. Miller, Federal Practice and Procedure § 1498, p. 250 (Supp. 1986) ("in order for an amendment adding a party to relate back under Rule 15(c) the party to be added must have received notice of the action before the statute of limitations has run").

The linchpin is notice, and notice within the limitations period. Of course, there is an element of arbitrariness here, but that is a characteristic of any limitations period. And it is an arbitrariness imposed by the legislature and not by the judicial process. See Note: Federal Rule of Civil Procedure

15(c): Relation Back of Amendments, 57 Minn. L. Rev. 83, 85, n. 8 (1972).[8]

The judgments of the Court of Appeals are affirmed.

It is so ordered.

JUSTICE STEVENS, with whom THE CHIEF JUSTICE and JUSTICE WHITE join, dissenting.

Certain principles are undisputed. If petitioners had filed their suits alleging that Fortune magazine libeled them on precisely the same date; had added the magic words "also known as Time, Incorporated" to the word "Fortune"; and had done everthing else exactly the same, petitioners would be entitled to proceed with their legal actions. Because petitioners committed the "fatal" error, *ante*, at 30, of identifying the defendant by its name of publication rather than its name of incorporation, however, the Court finds that they fell through a trapdoor—despite the fact that the magazine publisher's agent contemporaneously noted his understanding that the suits were directed against the magazine publisher (Time, Incorporated) fully as much as if petitioners had included the magic words.

In my view, the Court's decision represents an aberrational—and, let us hope, isolated—return to the "sporting theory of justice" condemned by Roscoe Pound 80 years ago.[1] The Court's result is supported neither by the language nor purposes of the Federal Rules, or of Rule 15(c) in particular.

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[8] Petitioners would garner support from Professor Clark Byse's article, Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform, 77 Harv. L. Rev. 40 (1963), cited in the Advisory Committee's Note to the 1966 amendment of Rule 15, 28 U. S. C. App., p. 550; 39 F. R. D. 83. That study was critically directed at four Federal District Court decisions concerning "relation back" in suits against Government officers. In each of the cases, however, the Government within the period of limitations was on notice of the claim.

Similarly, petitioners' reliance upon JUSTICE WHITE's footnote comment in dissent from the denial of certiorari in *Cooper* v. *United States Postal Service*, 471 U. S. 1022, 1025, n. 3 (1985), seems to us to be misplaced. JUSTICE WHITE, in fact, noted the inherent weakness of any such reliance ("Petitioner's position is somewhat weak in this regard because, while the complaint was filed within the requisite 30 days, no party was served with process within that period").

I

Before examining the language and the history of Rule 15(c), a preliminary comment on the facts is appropriate. In its May 31, 1982, issue, Fortune published the article in dispute. On May 9, 1983, petitioners filed their complaints. Since the New Jersey 1-year statute of limitations made it necessary to have the complaints filed by May 19, 1983, it is clear that the original complaints were filed 10 days ahead of that deadline.

Rule 4(j) of the Federal Rules of Civil Procedure also required that service of the summons and complaints be made within 120 days of the original filing—in other words, by September 6, 1983.[2] The summons and the original complaints were mailed to Time, Incorporated's registered agent on May 20, 1983, and received on May 23, 1983—well within the 120-day deadline imposed by the Rule.

The caption of the original complaints identified the defendant only as "Fortune." The description of the defendant in paragraph 2 of those complaints further explained that petitioners intended to sue "a foreign corporation having its principal offices at Time and Life Building, Sixth Avenue and 50th Street, New York, New York 10020 engaged in the publication of a magazine called 'Fortune' which is distributed throughout the world." App. 9a. There is no, and has never been any, suggestion that the caption confused or misled any agent of the defendant. Indeed, on the day that he received the summons and complaints, Time, Incorporated's agent forwarded them to Time, Incorporated's law department with a cover letter that stated:

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[1] See Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 29 American Bar Assn. Reports 395, 404–405 (1906).

[2] Rule 4(j) states in its entirety:

"If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule."

> "Remarks: Discrepancy in corporate title noted. Letter from atty. indicates papers are for Time, Incorporated as publisher of Fortune. Service was made by mail pursuant to Rule 4(c) of the Federal Rules of Civil Procedure." *Id.*, at 35a.

On July 18, 1983—well in advance of the September 6 deadline for service of process—petitioners filed an amendment to the complaints and redesignated "Fortune" as "Fortune, also known as Time, Incorporated." *Id.*, at 25a–26a. Again, there is no suggestion that this redesignation did cause, or could have caused, Time, Incorporated, any prejudice in maintaining its defense on the merits of the case. Nor is there any suggestion that Time, Incorporated, would have received better notice, or earlier notice, of the institution of the action if the magic words had been added to the initial complaints. The only question is whether Rule 15(c) should be construed to render petitioners' complaints untimely even though they were filed within the statute of limitations and even though Time, Incorporated, clearly had adequate notice of the timely filed complaints.

II

The majority relies exclusively on the "plain language" of Rule 15(c).[3] Far from compelling the majority's anomalous

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[3] Rule 15(c) provides:

"Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.[4] An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, result, the plain language of Rule 15(c) requires recognizing that there was no material difference between the notice given to Time, Incorporated, in the original complaints—from which Time, Incorporated, and its agent clearly understood that Time, Incorporated, was the intended defendant—and the notice that the Court concludes would have been adequate—in which petitioners would have appended "also known as Time, Incorporated" to the word "Fortune."

According to the majority, petitioners' complaints are barred because they did not satisfy a four-pronged test articulated in Rule 15(c). *Ante*, at 29–30. The majority ignores, however, a rather critical antecedent point. The four-pronged test is utterly irrelevant unless the amendment is one "changing the party against whom a claim is asserted." In this case, the technical correction filed in July added absolutely nothing to any party's understanding of "the party against whom" the claims were asserted—not to the plaintiffs' understanding, of course, and certainly not to Time, Incorporated's understanding, as its agent's letter in May made clear.

The plain language of Rule 15(c) discloses an obvious purpose to protect parties who are not named in the original complaint from prejudice that may arise when they are subsequently "brought in by amendment." If an original complaint names Smith as the tort-feasor and the plaintiff does not decide to sue Jones until after the statute of limitations has run, there would be obvious prejudice in allowing "an

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the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

"The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant."

amendment changing the party against whom a claim is asserted" unless Jones had actual notice of the claim before the statute ran. There is also a risk of prejudice whenever the identification of the defendant is so inaccurate or ambiguous that a reading of the complaint itself would not enable the defendant himself to realize that he was the party being sued.

The misdescription in this case, however, is not remotely of the kind that the Rule's "plain language" addresses. By any standard of fair notice, the difference between the description of the publisher of Fortune in the original complaints and the description of the publisher of Fortune in the amended complaints is no more significant than a misspelling, or perhaps a reference to "Time, Inc." instead of "Time, Incorporated."

In short, I would not construe this amendment as one "changing the party" against whom petitioners' claims are asserted. Although the words "Time, Incorporated" were first added to the complaints by the amendment, that entity cannot, in my judgment, fairly be described as a party "brought in by amendment" within the meaning of Rule 15(c).

III

Even if I agreed that the change in designation from "Fortune" to "Fortune also known as Time, Incorporated" brought in a new party, and even if I were willing to disregard the undisputed evidence of the Time, Incorporated agent's contemporaneous understanding of the unadorned "Fortune" designation, I would still find the majority's "plain language" analysis unpersuasive.

The heart of the majority's analysis is that petitioners failed to satisfy the fourth factor of the test it discerns in Rule 15(c)—that "the second and third requirements must have been fulfilled within the prescribed limitations period." *Ante*, at 29. The majority thus finds petitioners' "fatal" mistake in the failure to amend within the statute of limitations period.

The language in the Rule imposing the deadline for amendments that relate back does not, however, refer to the statute of limitations. Rather, it describes "the period provided by law for commencing the action *against him*" (emphasis added). As I have noted, that period includes two components, the time for commencing the action by the filing of a complaint and the time in which the action "against him" must be implemented by the service of process. If the party is sufficiently described in the original complaint to avoid any possibility of prejudice to the defendant, I see no reason for not construing the Rule to embrace both components of the period provided by law for bringing a timely action against a particular defendant.[4]

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[4] The majority seeks to bolster its "plain language" analysis with the Advisory Committee's reference to "the applicable limitations period." *Ante*, at 31. In my view, this statement begs, rather than settles, the question. I also agree with Judge Feinberg's analysis:

"Although on its face the phrase, 'within the period provided by law for commencing the action against him,' seems to mean the applicable statute of limitations period, such a literal interpretation is unjustified in jurisdictions where timely service of process can be effected after the statute of limitations has run. In those jurisdictions, even an accurately named defendant may not receive actual notice of the action against him prior to the running of the statute of limitations. Yet there is no doubt that the action against him is timely commenced. There is no reason why a misnamed defendant is entitled to earlier notice than he would have received had the complaint named him correctly. Calling the problem raised here a 'curious but minor difficulty of interpretation . . . over the language of the rule referring to the limitations period,' Professor (now Justice) Benjamin Kaplan, reporter for the Advisory Committee on Civil Rules, implicitly criticized a district court decision refusing relation back on facts somewhat similar to these. Kaplan, [Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 410, and n. 204 (1967)]. Professor Kaplan noted the anomaly of dismissing an action, which 'against the original defendant . . . would be considered timely brought despite the delayed service.' . . .

". . . We hold that under Rule 15(c) the period within which 'the party to be brought in' must receive notice of the action includes the reasonable

This construction is confirmed by a reference to the content of the notice requirement—what the majority labels the second prong of the four-part test. *Ante*, at 29. The Rule requires that the party affected by the amendment must have "received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits." This language surely indicates that if the notice that the defendant actually receives is just as timely and just as informative as that which would have been received if no mistake had occurred, the purpose of the requirement has been satisfied. In this case, Time, Incorporated would have known nothing different on May 23, 1983, if the complaints sent to its agent referred to "Fortune, also known as Time, Incorporated" than it knew from the complaints as sent, with their reference to "Fortune." Respondent has not even contended otherwise. Yet, for the Court, the first complaints would have been completely timely, and the second are completely barred.

IV

That the majority's reading of the "plain language" leads to bizarre results is not altogether surprising. For the majority, relying so heavily on what it views as the clarity of the language before it, ignores the mission and history of Rule 15(c).

The principal purpose of Rule 15(c) is to enable a plaintiff to correct a pleading error after the statute of limitations has run if the correction will not prejudice his adversary in any way. That purpose is defeated—and the Rule becomes largely superfluous—if it is construed to require the correction to be made before the statute has run. Moreover,

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time allowed under the federal rules for service of process." *Ingram* v. *Kumar*, 585 F. 2d 566, 571–572 (CA2 1978), cert. denied, 440 U. S. 940 (1979) (footnotes omitted).

It is curious that the majority, in relying on the Advisory Committee interpretation, ignores the reporter's almost contemporaneous understanding.

the specific liberalizing purpose of the 1966 amendment to the Rule is frustrated if the added language is construed to cut back on the number of cases in which relation back is permitted.

Prior to 1966, Rule 15(c) had included only the first sentence of the present Rule. In that form, the Rule had frequently been construed to allow relation back when there was a minor change in the designation of a party. See *Shapiro* v. *Paramount Film Distributing Corp.*, 274 F. 2d 743 (CA3 1960); 3 J. Moore, Federal Practice § 15-15[4.-1], p. 15-211 (2d ed. 1985). A group of contrary cases in which the plaintiffs had mistakenly sued the wrong Government official and not been allowed to amend their complaints after the statute had run gave rise to criticism of the Rule and the addition of the second and third sentences of its present text.[5] Ironically, it is the language added by the amendment in 1966 to broaden the category of harmless pleading errors which the Court construes today to narrow that category.[6]

V

The Court does not tell us whether it would enforce an equally harsh construction of the Rule if the scrivener's error had been a mere misspelling, or perhaps a reference to Time, Inc., instead of Time, Incorporated. More importantly, the Court does not provide a satisfactory explanation of why this case is, in fact, any different from such a case.[7] Most importantly, the decision is the product of an unnecessary and unjust construction of the language of the Rule.

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[5] See Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 407-410 (1967).

[6] There is also irony in the way the Court gives lipservice to its duty to construe the Federal Rules of Civil Procedure in a way that will facilitate a proper decision on the merits. *Ante*, at 27. How different was the approach the Court considered appropriate in 1962:

"It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' *Conley* v. *Gibson*, 355 U. S. 41, 48. The Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1." *Foman* v. *Davis*, 371 U. S. 178, 181-182.

The Court recognizes that "there is an element of arbitrariness here," *ante*, at 31, but finds solace in the fact that arbitrariness is no stranger to the law. *Ibid.* The Court is, of course, correct that arbitrariness sometimes arises from the application of rules and laws to the complexity of human experience. Far less understandable is the Court's willingness to aggravate, rather than alleviate, that arbitrariness, particularly when the decision to do so is demonstrably at odds with the language, purpose, and history of the Rule.

I respectfully dissent.

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[7] Indeed, if the misspelling of a name is sufficient to change the status of a legal document, then I assume that many of our much-discussed precedents had no legal force. See generally C. Wright, The Law of Federal Courts § 54, pp. 347–348, n. 5 (4th ed. 1983) (noting that the Court, and the official Reports, have continuously misspelled the parties' names in such cases as *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586 (1940) (parties' name was "Gobitas"); *Dred Scott* v. *Sandford*, 19 How. 393 (1857) (party's name was "Sanford"); *Swift* v. *Tyson*, 16 Pet. 1 (1842) (party's name was "Tysen"); and *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819) (party's name was "McCulloh")).

BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 85-521. Argued April 28, 1986—Decided June 19, 1986

In 1950, Congress amended the Social Security Act to authorize voluntary participation by States in the Social Security System with respect to old age, disability, and death benefits. Under 42 U. S. C. § 418(a) (1982 ed. and Supp. II), States may obtain coverage for employees of the State and its political subdivisions by executing an agreement (§ 418 Agreement) with the Secretary of Health and Human Services (Secretary) that is required to be "not inconsistent with the provisions of" § 418. As originally enacted, § 418(g) permitted States to terminate their § 418 Agreements upon giving at least two years' advance notice in writing to the Secretary. However, because the increasing rate of state withdrawals was threatening the integrity of the System, Congress amended § 418(g) in 1983 to provide that no § 418 Agreement "may be terminated, either in its entirety or with respect to any coverage group, on or after April 20, 1983." The amendment expressly prevents States from withdrawing employees from the System even if a termination notice had been filed prior to the amendment's enactment. In 1951, California and the Secretary entered into a § 418 Agreement that covered employees of the State and its political subdivisions. The Agreement recited that its provisions were "in conformity with" § 418, and included a termination clause mirroring the provisions of § 418(g) then in effect. When the 1983 amendment of § 418(g) prevented termination notices that California previously had filed from taking effect, proceedings were instituted in the Federal District Court attacking the validity of amended § 418(g). The court held that § 418(g) was unconstitutional, reasoning that the § 418 Agreement created a "contractual right" in favor of the State and its subdivisions to withdraw from the Social Security System, and that such right constituted "private property" within the meaning of the Just Compensation Clause of the Fifth Amendment. Although the court concluded that amended § 418(g) effected a taking of that property without providing the requisite just compensation, it held that a damages award would be contrary to Congress' will and accordingly simply declared § 418(g) unconstitutional.

Held: Amended § 418(g) does not effect a taking of property within the meaning of the Fifth Amendment. Pp. 51–56.

(a) In enacting the Social Security Act in 1935, Congress anticipated the need to respond to changing conditions, and therefore included § 1304, which expressly reserves to it "[t]he right to alter, amend, or repeal any provision" of the Act. The Act itself, including the original version of § 418(g), created no contractual rights, and therefore Congress had the power to amend that section. In view of the Act's purpose and structure, and of Congress' express reservation of authority to alter its provisions, courts should be extremely reluctant to construe § 418 Agreements in a manner that forecloses Congress' exercise of that authority. Pp. 51–53.

(b) The conclusion that Congress reserved the authority to amend not only § 418 but also § 418 Agreements entered into "in conformity with" § 418 is supported by precedent. Cf. *Sinking-Fund Cases*, 99 U. S. 700; *National Railroad Passenger Corp.* v. *Atchison, T. & S. F. R. Co.*, 470 U. S. 451. The language of § 1304's reservation expressly notified California that Congress retained the power to amend the law under which the Agreement was executed and by amending that law to alter the Agreement itself. Pp. 53–54.

(c) The "contractual right" at issue in this case bears little, if any, resemblance to rights held to constitute "property" within the meaning of the Fifth Amendment. The termination provision in the § 418 Agreement exactly tracked the language of the statute, conferring no right on California beyond that contained in § 418 itself. The termination provision in California's § 418 Agreement did not rise to the level of "property," and thus amended § 418 did not effect a taking within the meaning of the Fifth Amendment. Pp. 54–56.

613 F. Supp. 558, reversed and remanded.

POWELL, J., delivered the opinion for a unanimous Court.

Assistant Attorney General Willard argued the cause for appellants. With him on the briefs were *Solicitor General Fried, Deputy Solicitor General Geller, Charles A. Rothfeld, William Kanter*, and *Douglas Letter.*

Andrew D. Hurwitz argued the cause for appellees. *Ernest F. Schulzke* filed a brief for appellees Public Agencies Opposed to Social Security Entrapment et al. *John K. Van de Kamp*, Attorney General, *N. Eugene Hill*, Assistant Attorney General, and *Charles C. Kobayashi*, Supervising

Deputy Attorney General, filed a brief for appellee State of California.*

JUSTICE POWELL delivered the opinion of the Court.

On this appeal we review a decision of the District Court for the Eastern District of California that § 103 of the Social Security Amendments Act of 1983, 97 Stat. 71, 42 U. S. C. § 418(g) (1982 ed., Supp. II), effected a taking of property within the meaning of the Fifth Amendment by preventing States from withdrawing state and local government employees from the Social Security System.

I

A

The Social Security Act of 1935, 49 Stat. 620, as amended, 42 U. S. C. § 301 *et seq.* (1982 ed. and Supp. II), established an insurance program for "persons working in industry and commerce as a long-run safeguard against the occurrence of old-age dependency." H. R. Rep. No. 1300, 81st Cong., 1st Sess., 3 (1949). From that relatively humble beginning, the coverage of the Act has been expanded to provide benefits not only to the "insured worker in his old age," *ibid.*, but also to "individuals and families when workers retire, become disabled, or die." S. Rep. No. 98-13, vol. 2, p. 78 (1983).[1] The "basic idea" of Social Security "is that, while they are working, employees and their employers pay earmarked social security contributions (FICA taxes) . . . . Then, when earnings stop, or are reduced because of retirement in old-

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Benna Ruth Solomon and *Andrew D. Hurwitz* filed a brief for the Council of State Governments et al. as *amici curiae* urging affirmance.

[1] According to the Senate Special Committee on Aging, the Social Security System is "much more" than a "retirement program for older workers. . . . Social security is also family security, protecting workers and their families from loss of earnings because of death, retirement, or disability." Senate Special Committee on Aging, Termination of Social Security Coverage: The Impact on State and Local Government Employees, 94th Cong., 2d Sess., 9 (Comm. Print 1976) (hereinafter Senate Report on Aging).

age, death, or disability, cash benefits are paid to partially replace the earnings that were lost." *Ibid.* The System operates on a "pay as you go" basis, with current contributions "largely paid out in current benefits," *ibid.* In the words of Congress, the System now functions "as the Nation's basic social insurance program." H. R. Rep. No. 98-25, p. 19 (1983). To ensure that this important program could evolve as economic and social conditions changed, Congress expressly reserved to itself "[t]he right to alter, amend, or repeal any provision of" the Act. 42 U. S. C. § 1304.[2]

As of 1983, more than 90% of the Nation's paid employees, a total of more than 115 million people, participated in the Social Security System. H. R. Rep. No. 98-25, at 13.[3] Participation in the System is, and has been since its inception, "basically mandatory." *Id.*, at 19. Therefore, most workers covered by the System and their employers have no choice whether or not to participate. In 1935, when the Act was adopted, Congress faced questions as to whether it could compel the States and their political subdivisions to include their employees in the System.[4] Therefore, the Act at that time excluded such employees from its coverage. See 42 U. S. C. § 410(a)(7). Responding to subsequent pressure from States that sought Social Security coverage for their employees, in 1950 Congress enacted § 418, the provision at the heart of the controversy in this case.

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[2] Congress included this provision in the original Act, and has retained it ever since. See *Flemming* v. *Nestor*, 363 U. S. 603, 610-611 (1960).

[3] "The ten percent of workers not . . . covered by social security [in 1983] include[d] most Federal civilian workers (2.4 out of 2.7 million), about 30 percent of State and local employees (approximately 3 million), and 10-15 percent of employees of nonprofit organizations (up to 1 million)." H. R. Rep. No. 98-25, at 13.

[4] As Congress explained when it was studying the reasons underlying States' decisions to withdraw employees from the System, "[t]he Social Security Act of 1935 excluded from coverage all employment for States and localities, primarily because of the question of the constitutionality of any general levy of the employer tax on States and localities." Subcommittee on Social Security of House Committee on Ways and Means, Termination of Social Security Coverage for Employees of State and Local Governments and Nonprofit Groups, 97th Cong., 2d Sess., Ser. No. WMCP: 97-34, p. 20 (Comm. Print 1982) (hereinafter H. R. Comm. Print 97-34).

Section 418 authorizes voluntary participation by States in the Social Security System.[5] Under § 418(a), States may obtain coverage for their employees and employees of their political subdivisions, enrolling all or only specified "coverage groups" of workers. 42 U. S. C. § 418(a)(1) (1982 ed., Supp. II); see § 418(b)(5) (defining coverage group).[6] States enter the System by executing "an agreement" (§ 418 Agreement) with the Secretary of Health and Human Services (Secretary).[7] While § 418 gives States some authority over the content of the Agreements, *i. e.*, States may identify the covered employees, the provisions of a § 418 Agreement are required to be "not inconsistent with the provisions of" § 418. § 418(a)(1). From its enactment in 1950 through 1983, § 418 permitted States to terminate their § 418 Agreements "[u]pon giving at least two years' advance notice in writing to the [Secretary]." § 418(g)(1). Once a State exercised its option to withdraw, it could not thereafter reenter the System. § 418(g)(3).

Following adoption of § 418, all 50 States entered into § 418 Agreements with respect to their own employees, local government employees, or both.[8] "By the early 1960's most States had made coverage agreements," H. R. Rep. No. 98-25, at 18, and the percentage of state and local employees enrolled in the System increased from 11% in 1951 to 70% in 1970, H. R. Comm. Print 97-34, at 25. Since 1970, "[c]overage of State and local employees has remained fairly constant at 70-72 percent." H. R. Rep. No. 98-25, at 18. As of 1983, "some 9.4 million out of the approximately 13.2 million State and local employees" participated in the Social Security System. *Id.*, at 17.

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[5] At the time Congress enacted the amendment challenged in this case, it explained that provision for voluntary participation by employees of state and local governments was "the result of congressional desire to extend coverage as quickly and with as little difficulty as possible to those employees who needed it most." H. R. Rep. No. 98-25, at 19.

[6] Under the Act, therefore, States decide which groups of employees will receive Social Security coverage. Section 418(d)(3) creates an exception to this rule. Where state employees already are members of a retirement program, that section requires that a majority of such employees agree to participate in the Social Security System. 42 U. S. C. § 418(d)(3) (1982 ed. and Supp. II).

[7] For purposes of conciseness, we use the term "Secretary" to refer to the federal official responsible for administration of the System both under the current and prior versions of the Social Security Act.

For the first 20 years of their participation, "very few" States exercised their option under § 418(g) to withdraw from the System. *Id.*, at 18. Until the mid-1970's, the number of state and local employees "leaving the system was always greatly exceeded by the number of newly-covered employees—in most years, by 50,000 or more." *Ibid.*[9] Starting in 1976, however, this trend reversed, and the "numbers of positions being terminated from coverage" began to exceed "the numbers of newly-covered positions." *Ibid.* From 1977 through 1981, "termination activity was greater than in the previous ten years," with coverage "terminated for 96,000 State and local government employees." *Ibid.* As of 1982, coverage was "terminated for 595 State entities employing 190,000 workers." *Ibid.* Finally, "for the two-year period of 1983-84, terminations [were] pending for 634 State and local entities employing 227,000 workers." *Ibid.*

After studying the trend towards termination of § 418 Agreements and the reasons for it,[10] Congress determined that the increasing rate of withdrawals was threatening the integrity of the System in a number of important respects. As an initial matter, Congress observed that the current rate of withdrawals would cost the System between $500 million and $1 billion annually. H. R. Comm. Print 97–34, at 13–14. Congress further concluded that States' ability to withdraw was "inequitable both for the employees who lose coverage and for the vast majority of the nation's workforce who continue to pay into the system." H. R. Rep. No. 98–25, at 18–19. While States terminating § 418 Agreements often did so in the course of designing benefit packages that would attract long-term workers, Congress believed that sound social policy also required protection of employees who move from job to job. *Id.*, at 19. Moreover, "the shifting of the tax burden of social security from those workers who withdraw, but who remain entitled to future benefits based on their past earnings," created resentment on the part of workers whose participation in the System was mandatory.[11] *Ibid.*

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[8] As of 1983, the employees of Alaska, "the only State to withdraw from the system, and of Maine, Massachusetts, Nevada, and Ohio, which never chose to participate in the system," were not covered by Social Security. H. R. Rep. No. 98-25, at 17. Each of those States, however, was party to a § 418 Agreement that provided coverage to local government employees.

[9] During these years, "many terminations were caused by consolidation of local jurisdictions, rather than by withdrawal from the social security system." *Id.*, at 18.

[10] The Senate Special Committee on Aging found that States offered the following reasons for terminating their § 418 Agreements: employees

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wanted more take-home pay through a reduction in payroll deductions; state and local governments sought to cut costs by dropping Social Security coverage; news reports concerning "the projected exhaustion of social security trust funds in the 1980's" led employees to believe that benefits would cease; state and local governments believed that Social Security taxes would continue to rise, and thus viewed termination as a means "to achieve more static and budgetable expenditures"; some employees favored termination because they perceived that they would receive Social Security benefits even if they were no longer required to pay into the System; and alternative retirement plans were believed to pay higher levels of benefits. Senate Report on Aging 6–8; see also H. R. Comm. Print 97–34, at 6–7. The Committee also found that "many" decisions to withdraw from the System were made in the absence of "[i]nformation necessary for informed judgments." Senate Report on Aging 8.

[11] Congress regarded voluntary participation by some employees, such as those of state and local governments, as an anomaly in an otherwise mandatory program. "The fundamental principle underlying compulsory coverage for most workers is that responsibility for paying for insurance against such risks should be borne by the society as a whole to the extent possible." H. R. Comm. Print 97–34, at 4. Mandatory participation is necessary to sustain the "'pay-as-you-go' financing structure," particularly since workers retain coverage "regardless of how many times they change

Accordingly, Congress decided to amend § 418(g) by repealing the termination provision. As amended, § 418(g) provides that no § 418 Agreement "may be terminated, either in its entirety or with respect to any coverage group, on or after April 20, 1983." The amendment expressly prevents States from withdrawing employees from the System even if a termination notice had been filed prior to enactment of the amendment.[12]

B

On March 9, 1951, California and the Secretary entered into a § 418 Agreement, effective as of January 1, 1951, under which the parties agreed to extend Social Security coverage to employees of the State and its political subdivisions. The Agreement recited that its provisions were "in conformity with" § 418, and authorized the State to modify the Agreement to include additional groups of employees, "such modification to be consistent with the provisions of" § 418. The Agreement also included a clause that permitted the State to terminate the Agreement either in its entirety or with respect to particular coverage groups. The terms of the clause

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their jobs in a lifetime." *Ibid.* Mandatory participation ensures workers that they will obtain a minimum level of benefits in the event of a catastrophe that the worker did not foresee or plan for. *Ibid.* In the context of a mandatory system, voluntary participation for some employees was, in Congress' view, "inconsistent with the principle of equal treatment of all citizens." *Id.*, at 5.

[12] The amendment, set out in Pub. L. 98–21, § 103, 97 Stat. 71–72 provides:

"(a) [42 U. S. C. § 418(g)] is amended to read as follows:

"'Duration of Agreement

"(g) No agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after the date of the enactment of the Social Security Amendments of 1983.'

"(b) The amendment made by subsection (a) shall apply to any agreement in effect under [§ 418] on the date of the enactment of this Act, without regard to whether a notice of termination is in effect on such date, and to any agreement or modification thereof which may become effective under such [§ 418] after that date."

exactly mirrored the statutory termination provision embodied in § 418(g).[13]

When Congress amended § 418(g) in 1983, California had filed termination notices on behalf of 71 of its political subdivisions, employing approximately 34,000 persons.[14] When the amendment prevented the termination notices from taking effect, appellees commenced the lawsuits underlying this appeal, naming as defendants the United States and the Secretary and Undersecretary of the Department of Health and Human Services. The first lawsuit was brought by several public agencies of California, their employees and taxpayers, and by an organization calling itself Public Agencies Opposed to Social Security Entrapment. These parties alleged, among other claims, that amended § 418(g) had deprived them of their "contract rights" without just compensation in violation of the Fifth Amendment.[15] In the second lawsuit, the State of California sought to enjoin enforcement of § 418(g) as well as a declaration that the section was unconstitutional. The State claimed that the federal defendants had acted in excess of their constitutional authority and had violated the Tenth Amendment by breaching their contract with the State and by impairing the State's "ability . . . to structure its relationships with its employees."[16] App. 26–27.

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[13] The termination provision in California's § 418 Agreement stated:

"The State, upon giving at least two years' advance notice in writing to the [Secretary], may terminate this agreement, either in its entirety or with respect to any coverage group, effective at the end of a calendar quarter specified in the notice, provided, however, that the agreement may be terminated in its entirety only if it has been in effect not less than five years prior to receipt of such notice, and provided further that the agreement may be terminated with respect to any coverage group only if it has been in effect with respect to such coverage group for not less than five years prior to receipt of such notice." Reprinted, App. 31.

[14] If these employees were withdrawn from the System, "approximately $33.7 millio[n] would be lost to the social security trust funds in 1984." *Id.*, at 61.

[15] Plaintiffs in this lawsuit also alleged that the enactment denied them their contract rights without due process, that it constituted an attempt to regulate "'essential state and local government functions,' in violation of the Tenth Amendment," and that they were entitled to specific performance for the Government's breach of contract. *Public Agencies Opposed to Social Security Entrapment* v. *Heckler*, 613 F. Supp. 558, 565 (ED Cal. 1985).

Ruling on cross-motions for summary judgment, the District Court held that § 418(g) was unconstitutional. *Public Agencies Opposed to Social Security Entrapment* v. *Heckler*, 613 F. Supp. 558 (ED Cal. 1985).[17] The court decided that the § 418 Agreement created a "contractual right" to withdraw from the Social Security System that ran in favor of both the State and its public agencies. This contractual right existed independently of the statutory termination provision, and Congress derived no authority from § 1304[18] to amend the § 418 Agreement, as opposed to § 418.

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[16] Though the State did not press any claim that amended § 418(g) effected a taking of its property without the compensation required by the Fifth Amendment, the District Court rested its decision on that ground, finding it unnecessary to reach any of the arguments raised by the State. Therefore, none of those arguments are before us.

[17] Before reaching the merits, the District Court determined that the plaintiffs in both suits, appellees here, had standing to challenge the validity of the enactment. With respect to the first lawsuit, brought by the public agencies and certain individuals, the court concluded that the agencies alleged an injury sufficient to confer standing because they claimed that amended § 418(g) deprived them of their contractual rights as third-party beneficiaries of the State's § 418 Agreement. *Id.*, at 567–570. The individual plaintiffs had standing because they claimed that the federal defendants had denied them equal protection. *Id.*, at 571. With respect to the second suit, the court found that the State had standing because it alleged "a judicially cognizable interest in the preservation of its own sovereignty, and a diminishment of that sovereignty by the alleged interference in its employment relations with its public employees." *Id.*, at 567. While appellants suggest in this Court that none of the plaintiffs in the lawsuit brought by the public agencies were properly before the District Court, they concede, and we agree, that there is no question concerning the State's standing to bring the action. Therefore, the District Court plainly had authority to resolve this controversy, as do we.

The contractual right to withdraw, reasoned the District Court, constituted "private property" within the meaning of the Just Compensation Clause of the Fifth Amendment. Amended § 418(g) effected a taking of that property without providing the requisite just compensation. In the court's view, the "only rational compensation would be reimbursement by the United States to the State or public agencies, of the amount of money they currently pay to the United States for their participation" in the Social Security Program. 613 F. Supp., at 575. Since amended § 418(g) was enacted to solve the Social Security "financial crisis," however, the District Court concluded that an order awarding this measure of damages would be "simply and clearly contrary to the will of Congress." *Ibid.* Accordingly, the District Court simply declared § 418(g) unconstitutional. *Ibid.* We noted probable jurisdiction, 474 U. S. 1004 (1985), and now reverse.

II

A

Congress' decision that American workers need a federal program of social insurance protecting them in old age and disability "has of necessity called forth a highly complicated and interrelated statutory structure." *Flemming* v. *Nestor*, 363 U. S. 603, 610 (1960). Since the Act was designed to protect future, as well as present, generations of workers, it was inevitable that amendment of its provisions would be necessary in response to evolving social and economic conditions unforeseeable in 1935. *Ibid.* Congress anticipated that it would be necessary to respond to "ever-changing conditions" with "flexibility and boldness," *ibid.*, and therefore included in the Act "a clause expressly reserving to it '[t]he right to alter, amend, or repeal any provision' of the Act. § 1104, 49 Stat. 648, 42 U. S. C. § 1304. That provision makes express what is implicit in the institutional needs of the program." *Id.*, at 611. As appellees must concede, the Act itself, including the original version of § 418(g), created no contractual rights. Cf. *Flemming* v. *Nestor*, *supra*, at 608–611; see also *National Railroad Passenger Corporation* v. *Atchison, T & S. F. R. Co.*, 470 U. S. 451, 465–470 (1985). Therefore, there is no doubt that Congress had the power to amend the section.

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[18] Title 42 U. S. C. § 1304 provides: "The right to alter, amend, or repeal any provision of this chapter is hereby reserved to the Congress."

In view of the purpose and structure of the Act, and of Congress' express reservation of authority to alter its provisions, courts should be extremely reluctant to construe § 418 Agreements in a manner that forecloses Congress' exercise of that authority. While the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights, see *Perry* v. *United States*, 294 U. S. 330, 350–354 (1935); *Lynch* v. *United States*, 292 U. S. 571 (1934), we have declined in the context of commercial contracts to find that a "sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in" the contract. *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130, 148 (1982). Rather, we have emphasized that "[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Ibid.* Therefore, contractual arrangements, including those to which a sovereign itself is party, "remain subject to subsequent legislation" by the sovereign. *Id.*, at 147.

These principles form the backdrop against which we must consider the District Court's decision effectively to forbid Congress to amend a provision of the Social Security Act. That decision heeded none of this Court's often-repeated admonitions that contracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority. Those admonitions take on added force when the arrangement pursuant to which the Government is claimed to have surrendered a sovereign power is one that serves to implement a comprehensive social welfare program affecting millions of individuals throughout our Nation.

B

Venerable precedent supports our conclusion that Congress reserved the authority to amend not only § 418 but also Agreements entered into "in conformity with" that section. Just last Term, we considered a statute in which Congress had "'expressly reserved' its right to 'repeal, alter, or amend' the Act at any time," *National Railroad Passenger Corporation*, *supra*, at 456, and we noted that the "effect of these few simple words" has been settled since the *Sinking-Fund Cases*, 99 U. S. 700 (1879). 470 U. S., at 467–468, n. 22. The *Sinking-Fund Cases* involved federal statutes that governed railroads' obligations to the United States on subsidy bonds. The statutes in question expressly reserved Congress' authority to repeal, alter, or amend them, and Congress exercised that power by requiring the railroads to set aside part of their current income as a sinking fund to meet their debts to the Government as those debts came due. The railroads claimed that this amendment deprived them of property without due process and improperly interfered with their vested rights. 99 U. S., at 719. In rejecting those arguments, the Court explained that through the language of reservation, "Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments as come within the just scope of legislative power." *Id.*, at 720. The effect of the Court's construction of the reservation was to authorize Congress not only to amend the statute granting the railroads' corporate charter but also to change the stipulations of a contract made under that charter subsequently to and independently of the original statute. Whatever the limits of the reserved power, it was "safe to say" that Congress had the authority to provide by amendment whatever rules it might "have prescribed in the original charter" and terms governing the "performance of contracts already entered into." *Id.*, at 721.

This reasoning disposes of appellees' contention that Congress lacked authority to amend California's § 418 Agreement. The State accepted the Agreement under an Act that contained the language of reservation. That language expressly notified the State that Congress retained the power to amend the law under which the Agreement was executed and by amending that law to alter the Agreement itself.[19] We have no doubt that in 1950 Congress could have provided that States electing to enter the Social Security System would not have authority to terminate their participation. Therefore, amended § 418(g) falls well within the limits of Congress' reserved power to alter the law governing performance of § 418 Agreements.

C

The § 418 Agreement provided that its terms were "in conformity with" § 418. Therefore, the Agreement expressly incorporated § 418, which of course was fully subject to Congress' reserved power of amendment. Appellees nonetheless insist that the termination provision embodied in the

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[19] The language of § 418 and of California's § 418 Agreement provides further support for this conclusion. Section 418(a)(1) requires that the provisions of § 418 Agreements be "not inconsistent with the provisions of this section," 42 U. S. C. § 418(a)(1) (1982 ed., Supp. II), and the Agreement provided that it was "in conformity with" § 418. The State was thus on notice that the terms of its Agreement must mirror the provisions of the section, which could be amended under the reserved power. If Congress amended § 418 in such a manner as to render a provision of an Agreement "inconsistent" or no longer "in conformity" with the section, then the logical conclusion is that the inconsistent provision no longer was to be given legal effect.

Agreement constituted a valuable property right that was "taken" when Congress enacted amended § 418(g). In the *Sinking-Fund Cases,* the Court did observe that Congress' exercise of the reserved power "has a limit" in that Congress could not rely on that power to "take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made." 99 U. S., at 720. Similarly, other decisions have held that Congress does not have the power to repudiate its own debts, which constitute "property" to the lender, simply in order to save money. *Perry* v. *United States,* 294 U. S., at 350–351; see *Lynch* v. *United States,* 292 U. S., at 576–577.

But the "contractual right" at issue in this case bears little, if any, resemblance to rights held to constitute "property" within the meaning of the Fifth Amendment. The termination provision in the Agreement exactly tracked the language of the statute, conferring no right on the State beyond that contained in § 418 itself. The provision constituted neither a debt of the United States, see *Perry* v. *United States, supra,* nor an obligation of the United States to provide benefits under a contract for which the obligee paid a monetary premium, see *Lynch* v. *United States, supra.* The termination clause was not unique to this Agreement; nor was it a term over which the State had any bargaining power or for which the State provided independent consideration. Rather, the provision simply was part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare. Under these circumstances, we conclude that the termination provision in California's § 418 Agreement did not rise to the level of "property." The provision simply cannot be viewed as conferring any sort of "vested right" in the face of precedent concerning the effect of Congress' reserved power on agreements entered into under a statute containing the language of reservation. Since appellees had no property right in the termination clause, amended § 418 did not effect a taking within the meaning of the Fifth Amendment.

III

The judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with this decision.

It is so ordered.

MERITOR SAVINGS BANK, FSB *v.* VINSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84–1979. Argued March 25, 1986—Decided June 19, 1986

Respondent former employee of petitioner bank brought an action against the bank and her supervisor at the bank, claiming that during her employment at the bank she had been subjected to sexual harassment by the supervisor in violation of Title VII of the Civil Rights Act of 1964, and seeking injunctive relief and damages. At the trial, the parties presented conflicting testimony about the existence of a sexual relationship between respondent and the supervisor. The District Court denied relief without resolving the conflicting testimony, holding that if respondent and the supervisor did have a sexual relationship, it was voluntary and had nothing to do with her continued employment at the bank, and that therefore respondent was not the victim of sexual harassment. The court then went on to hold that since the bank was without notice, it could not be held liable for the supervisor's alleged sexual harassment. The Court of Appeals reversed and remanded. Noting that a violation of Title VII may be predicated on either of two types of sexual harassment—(1) harassment that involves the conditioning of employment benefits on sexual favors, and (2) harassment that, while not affecting economic benefits, creates a hostile or offensive working environment—the Court of Appeals held that since the grievance here was of the second type and the District Court had not considered whether a violation of this type had occurred, a remand was necessary. The court further held that the need for a remand was not obviated by the fact that the District Court had found that any sexual relationship between respondent and the supervisor was a voluntary one, a finding that might have been based on testimony about respondent's "dress and personal fantasies" that "had no place in the litigation." As to the bank's liability, the Court of Appeals held that an employer is absolutely liable for sexual harassment by supervisory personnel, whether or not the employer knew or should have known about it.

Held:

1. A claim of "hostile environment" sexual harassment is a form of sex discrimination that is actionable under Title VII. Pp. 63–69.

(a) The language of Title VII is not limited to "economic" or "tangible" discrimination. Equal Employment Opportunity Commission Guidelines fully support the view that sexual harassment leading to noneconomic injury can violate Title VII. Here, respondent's allegations were sufficient to state a claim for "hostile environment" sexual harassment. Pp. 63–67.

(b) The District Court's findings were insufficient to dispose of respondent's "hostile environment" claim. The District Court apparently erroneously believed that a sexual harassment claim will not lie absent an *economic* effect on the complainant's employment, and erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her participation in them was voluntary. Pp. 67–68.

(c) The District Court did not err in admitting evidence of respondent's sexually provocative speech and dress. While "voluntariness" in the sense of consent is no defense to a sexual harassment claim, it does not follow that such evidence is irrelevant as a matter of law in determining whether the complainant found particular sexual advances unwelcome. Pp. 68–69.

2. The Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. While common-law agency principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. In this case, however, the mere existence of a grievance procedure in the bank and the bank's policy against discrimination, coupled with respondent's failure to invoke that procedure, do not necessarily insulate the bank from liability. Pp. 69–73.

243 U. S. App. D. C. 323, 753 F. 2d 141, affirmed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, STEVENS, and O'CONNOR, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 73. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 74.

F. Robert Troll, Jr., argued the cause for petitioner. With him on the briefs were *Charles H. Fleischer* and *Randall C. Smith*.

Patricia J. Barry argued the cause for respondent Vinson. With her on the brief was *Catherine A. MacKinnon.**

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*Briefs of *amici curiae* urging reversal were filed for the United States et al. by *Solicitor General Fried, Assistant Attorneys General Reynolds*

JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents important questions concerning claims of workplace "sexual harassment" brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*

I

In 1974, respondent Mechelle Vinson met Sidney Taylor, a vice president of what is now petitioner Meritor Savings Bank (bank) and manager of one of its branch offices. When respondent asked whether she might obtain employment at the bank, Taylor gave her an application, which she completed and returned the next day; later that same day Taylor called her to say that she had been hired. With Taylor as her supervisor, respondent started as a teller-trainee, and thereafter was promoted to teller, head teller, and assistant

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and *Willard, Deputy Solicitor General Kuhl, Albert G. Lauber, Jr., John F. Cordes, John F. Daly,* and *Johnny J. Butler;* for the Equal Employment Advisory Council by *Robert E. Williams, Douglas S. McDowell,* and *Garen E. Dodge;* for the Chamber of Commerce of the United States by *Dannie B. Fogleman* and *Stephen A. Bokat;* and for the Trustees of Boston University by *William Burnett Harvey* and *Michael B. Rosen.*

Briefs of *amici curiae* urging affirmance were filed for the State of New Jersey et al. by *W. Cary Edwards,* Attorney General of New Jersey, *James J. Ciancia,* Assistant Attorney General, *Susan L. Reisner* and *Lynn B. Norcia,* Deputy Attorneys General, *John Van de Kamp,* Attorney General of California, *Joseph I. Lieberman,* Attorney General of Connecticut, *Neil F. Hartigan,* Attorney General of Illinois, *Hubert H. Humphrey III,* Attorney General of Minnesota, *Paul Bardacke,* Attorney General of New Mexico, *Robert Abrams,* Attorney General of New York, *Jeffrey L. Amestoy,* Attorney General of Vermont, and *Elisabeth S. Shuster;* for the American Federation of Labor and the Congress of Industrial Organizations et al. by *Marsha S. Berzon, Joy L. Koletsky, Laurence Gold, Winn Newman,* and *Sarah E. Burns;* for the Women's Bar Association of Massachusetts et al. by *S. Beville May;* for the Women's Bar Association of the State of New York by *Stephen N. Shulman* and *Lynda S. Mounts;* for the Women's Legal Defense Fund et al. by *Linda R. Singer, Anne E. Simon, Nadine Taub, Judith Levin,* and *Barry H. Gottfried;* for the Working Women's Institute et al. by *Laurie E. Foster;* and for Senator Paul Simon et al. by *Michael H. Salsbury.*

branch manager. She worked at the same branch for four years, and it is undisputed that her advancement there was based on merit alone. In September 1978, respondent notified Taylor that she was taking sick leave for an indefinite period. On November 1, 1978, the bank discharged her for excessive use of that leave.

Respondent brought this action against Taylor and the bank, claiming that during her four years at the bank she had "constantly been subjected to sexual harassment" by Taylor in violation of Title VII. She sought injunctive relief, compensatory and punitive damages against Taylor and the bank, and attorney's fees.

At the 11-day bench trial, the parties presented conflicting testimony about Taylor's behavior during respondent's employment.† Respondent testified that during her probationary period as a teller-trainee, Taylor treated her in a fatherly way and made no sexual advances. Shortly thereafter, however, he invited her out to dinner and, during the course of the meal, suggested that they go to a motel to have sexual relations. At first she refused, but out of what she described as fear of losing her job she eventually agreed. According to respondent, Taylor thereafter made repeated demands upon her for sexual favors, usually at the branch, both during and after business hours; she estimated that over the next several years she had intercourse with him some 40 or 50 times. In addition, respondent testified that Taylor fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions. These activities ceased after 1977, respondent stated, when she started going with a steady boyfriend.

Respondent also testified that Taylor touched and fondled other women employees of the bank, and she attempted to call witnesses to support this charge. But while some supporting testimony apparently was admitted without objection, the District Court did not allow her "to present wholesale evidence of a pattern and practice relating to sexual advances to other female employees in her case in chief, but advised her that she might well be able to present such evidence in rebuttal to the defendants' cases." *Vinson* v. *Taylor*, 22 EPD ¶30,708, p. 14,693, n. 1, 23 FEP Cases 37, 38–39, n. 1 (DC 1980). Respondent did not offer such evidence in rebuttal. Finally, respondent testified that because she was afraid of Taylor she never reported his harassment to any of his supervisors and never attempted to use the bank's complaint procedure.

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†Like the Court of Appeals, this Court was not provided a complete transcript of the trial. We therefore rely largely on the District Court's opinion for the summary of the relevant testimony.

Taylor denied respondent's allegations of sexual activity, testifying that he never fondled her, never made suggestive remarks to her, never engaged in sexual intercourse with her, and never asked her to do so. He contended instead that respondent made her accusations in response to a business-related dispute. The bank also denied respondent's allegations and asserted that any sexual harassment by Taylor was unknown to the bank and engaged in without its consent or approval.

The District Court denied relief, but did not resolve the conflicting testimony about the existence of a sexual relationship between respondent and Taylor. It found instead that

> "[i]f [respondent] and Taylor did engage in an intimate or sexual relationship during the time of [respondent's] employment with [the bank], that relationship was a voluntary one having nothing to do with her continued employment at [the bank] or her advancement or promotions at that institution." *Id.*, at 14,692, 23 FEP Cases, at 42 (footnote omitted).

The court ultimately found that respondent "was not the victim of sexual harassment and was not the victim of sexual discrimination" while employed at the bank. *Ibid.*, 23 FEP Cases, at 43.

Although it concluded that respondent had not proved a violation of Title VII, the District Court nevertheless went on to address the bank's liability. After noting the bank's express policy against discrimination, and finding that neither respondent nor any other employee had ever lodged a complaint about sexual harassment by Taylor, the court ultimately concluded that "the bank was without notice and cannot be held liable for the alleged actions of Taylor." *Id.*, at 14,691, 23 FEP Cases, at 42.

The Court of Appeals for the District of Columbia Circuit reversed. 243 U. S. App. D. C. 323, 753 F. 2d 141 (1985). Relying on its earlier holding in *Bundy* v. *Jackson*, 205 U. S. App. D. C. 444, 641 F. 2d 934 (1981), decided after the trial in this case, the court stated that a violation of Title VII may be predicated on either of two types of sexual harassment: harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment. The court drew additional support for this position from the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, 29 CFR § 1604.11(a) (1985), which set out these two types of sexual harassment claims. Believing that "Vinson's grievance was clearly of the [hostile environment] type," 243 U. S. App. D. C., at 327, 753 F. 2d, at 145, and that the District Court had not considered whether a violation of this type had occurred, the court concluded that a remand was necessary.

The court further concluded that the District Court's finding that any sexual relationship between respondent and Taylor "was a voluntary one" did not obviate the need for a remand. "[U]ncertain as to precisely what the [district] court meant" by this finding, the Court of Appeals held that if the evidence otherwise showed that "Taylor made Vinson's toleration of sexual harassment a condition of her employment," her voluntariness "had no materiality whatsoever."

Id., at 328, 753 F. 2d, at 146. The court then surmised that the District Court's finding of voluntariness might have been based on "the voluminous testimony regarding respondent's dress and personal fantasies," testimony that the Court of Appeals believed "had no place in this litigation." *Id.*, at 328, n. 36, 753 F. 2d, at 146, n. 36.

As to the bank's liability, the Court of Appeals held that an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct. The court relied chiefly on Title VII's definition of "employer" to include "any agent of such a person," 42 U. S. C. § 2000e(b), as well as on the EEOC Guidelines. The court held that a supervisor is an "agent" of his employer for Title VII purposes, even if he lacks authority to hire, fire, or promote, since "the mere existence—or even the appearance—of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose on employees." 243 U. S. App. D. C., at 332, 753 F. 2d, at 150.

In accordance with the foregoing, the Court of Appeals reversed the judgment of the District Court and remanded the case for further proceedings. A subsequent suggestion for rehearing en banc was denied, with three judges dissenting. 245 U. S. App. D. C. 306, 760 F. 2d 1330 (1985). We granted certiorari, 474 U. S. 1047 (1985), and now affirm but for different reasons.

II

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a)(1). The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. 110 Cong. Rec. 2577–2584 (1964). The principal argument in opposition to the amendment was that "sex discrimination" was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. See *id.*, at 2577 (statement of Rep. Celler quoting letter from United States Department of Labor); *id.*, at 2584 (statement of Rep. Green). This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on "sex."

Respondent argues, and the Court of Appeals held, that unwelcome sexual advances that create an offensive or hostile working environment violate Title VII. Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex. Petitioner apparently does not challenge this proposition. It contends instead that in prohibiting discrimination with respect to "compensation, terms, conditions, or privileges" of employment, Congress was concerned with what petitioner describes as "tangible loss" of "an economic character," not "purely psychological aspects of the workplace environment." Brief for Petitioner 30–31, 34. In support of this claim petitioner observes that in both the legislative history of Title VII and this Court's Title VII decisions, the focus has been on tangible, economic barriers erected by discrimination.

We reject petitioner's view. First, the language of Title VII is not limited to "economic" or "tangible" discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent "'to strike at the entire spectrum of disparate treatment of men and women'" in employment. *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, 707, n. 13 (1978), quoting *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (CA7 1971). Petitioner has pointed to nothing in the Act to suggest that Congress contemplated the limitation urged here.

Second, in 1980 the EEOC issued Guidelines specifying that "sexual harassment," as there defined, is a form of sex discrimination prohibited by Title VII. As an "administrative interpretation of the Act by the enforcing agency," *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 433–434 (1971), these Guidelines, "'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,'" *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 141–142 (1976), quoting *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). The EEOC Guidelines fully support the view that harassment leading to noneconomic injury can violate Title VII.

In defining "sexual harassment," the Guidelines first describe the kinds of workplace conduct that may be actionable under Title VII. These include "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 29 CFR § 1604.11(a) (1985). Relevant to the charges at issue in this case, the Guidelines provide that such sexual misconduct constitutes prohibited "sexual harassment," whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." § 1604.11(a)(3).

In concluding that so-called "hostile environment" *(i. e.,* non *quid pro quo)* harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult. See generally 45 Fed. Reg. 74676 (1980). *Rogers* v. *EEOC*, 454 F. 2d 234 (CA5 1971), cert. denied, 406 U. S. 957 (1972), was apparently the first case to recognize a cause of action based upon a discriminatory work environment. In *Rogers*, the Court of Appeals for the Fifth

Circuit held that a Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele. The court explained that an employee's protections under Title VII extend beyond the economic aspects of employment:

> "[T]he phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . . ." 454 F. 2d, at 238.

Courts applied this principle to harassment based on race, *e. g., Firefighters Institute for Racial Equality* v. *St. Louis*, 549 F. 2d 506, 514–515 (CA8), cert. denied *sub nom. Banta* v. *United States*, 434 U. S. 819 (1977); *Gray* v. *Greyhound Lines, East*, 178 U. S. App. D. C. 91, 98, 545 F. 2d 169, 176 (1976), religion, *e. g., Compston* v. *Borden, Inc.*, 424 F. Supp. 157 (SD Ohio 1976), and national origin, *e. g., Cariddi* v. *Kansas City Chiefs Football Club*, 568 F. 2d 87, 88 (CA8 1977). Nothing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise prohibited. The Guidelines thus appropriately drew from, and were fully consistent with, the existing case law.

Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. As the Court of Appeals for the Eleventh Circuit wrote in *Henson* v. *Dundee*, 682 F. 2d 897, 902 (1982):

> "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."

Accord, *Katz* v. *Dole*, 709 F. 2d 251, 254–255 (CA4 1983); *Bundy* v. *Jackson*, 205 U. S. App. D. C., at 444–454, 641 F. 2d, at 934–944; *Zabkowicz* v. *West Bend Co.*, 589 F. Supp. 780 (ED Wis. 1984).

Of course, as the courts in both *Rogers* and *Henson* recognized, not all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. See *Rogers* v. *EEOC*, *supra*, at 238 ("mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to sufficiently significant degree to violate Title VII); *Henson*, 682 F. 2d, at 904 (quoting same). For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." *Ibid.* Respondent's allegations in this case—which include not only pervasive harassment but also criminal conduct of the most serious nature—are plainly sufficient to state a claim for "hostile environment" sexual harassment.

The question remains, however, whether the District Court's ultimate finding that respondent "was not the victim of sexual harassment," 22 EPD ¶30,708, at 14,692–14,693, 23 FEP Cases, at 43, effectively disposed of respondent's claim. The Court of Appeals recognized, we think correctly, that this ultimate finding was likely based on one or both of two erroneous views of the law. First, the District Court apparently believed that a claim for sexual harassment will not lie absent an *economic* effect on the complainant's employment. See *ibid.* ("It is without question that sexual harassment of female employees in which they are asked or required to submit to sexual demands as a *condition to obtain employment or to maintain employment or to obtain promotions* falls within protection of Title VII") (emphasis added). Since it appears that the District Court made its findings without ever considering the "hostile environment" theory of sexual harassment, the Court of Appeals' decision to remand was correct.

Second, the District Court's conclusion that no actionable harassment occurred might have rested on its earlier "finding" that "[i]f [respondent] and Taylor did engage in an intimate or sexual relationship . . . , that relationship was a voluntary one." *Id.*, at 14,692, 23 FEP Cases, at 42. But the fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome." 29 CFR § 1604.11(a) (1985). While the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact, the District Court in this case erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.

Petitioner contends that even if this case must be remanded to the District Court, the Court of Appeals erred in one of the terms of its remand. Specifically, the Court of Appeals stated that testimony about respondent's "dress and personal fantasies," 243 U. S. App. D. C., at 328, n. 36, 753 F. 2d, at 146, n. 36, which the District Court apparently admitted into evidence, "had no place in this litigation." *Ibid.* The apparent ground for this conclusion was that respondent's voluntariness *vel non* in submitting to Taylor's advances was immaterial to her sexual harassment claim. While "voluntariness" in the sense of consent is not a defense to such a claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant. The EEOC Guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of "the record as a whole" and "the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." 29 CFR § 1604.11(b) (1985). Respondent's claim that any marginal relevance of the evidence in question was outweighed by the potential for unfair prejudice is the sort of argument properly addressed to the District Court. In this case the District Court concluded that the evidence should be admitted, and the Court of Appeals' contrary conclusion was based upon the erroneous, categorical view that testimony about provocative dress and publicly expressed sexual fantasies "had no place in this litigation." 243 U. S. App. D. C., at 328, n. 36, 753 F. 2d, at 146, n. 36. While the District Court must carefully weigh the applicable considerations in deciding whether to admit evidence of this kind, there is no *per se* rule against its admissibility.

III

Although the District Court concluded that respondent had not proved a violation of Title VII, it nevertheless went on to consider the question of the bank's liability. Finding that "the bank was without notice" of Taylor's alleged conduct, and that notice to Taylor was not the equivalent of notice to the bank, the court concluded that the bank therefore could not be held liable for Taylor's alleged actions. The Court of Appeals took the opposite view, holding that an employer is strictly liable for a hostile environment created by a supervisor's sexual advances, even though the employer neither knew nor reasonably could have known of the alleged misconduct. The court held that a supervisor, whether or not he possesses the authority to hire, fire, or promote, is necessarily an "agent" of his employer for all Title VII purposes, since "even the appearance" of such authority may enable him to impose himself on his subordinates.

The parties and *amici* suggest several different standards for employer liability. Respondent, not surprisingly, defends the position of the Court of Appeals. Noting that Title VII's definition of "employer" includes any "agent" of the employer, she also argues that "so long as the circumstance is work-related, the supervisor is the employer and the employer is the supervisor." Brief for Respondent 27. Notice to Taylor that the advances were unwelcome, therefore, was notice to the bank.

Petitioner argues that respondent's failure to use its established grievance procedure, or to otherwise put it on notice of the alleged misconduct, insulates petitioner from liability for Taylor's wrongdoing. A contrary rule would be unfair, petitioner argues, since in a hostile environment harassment case the employer often will have no reason to know about, or opportunity to cure, the alleged wrongdoing.

The EEOC, in its brief as *amicus curiae*, contends that courts formulating employer liability rules should draw from traditional agency principles. Examination of those principles has led the EEOC to the view that where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them. Brief for United States and EEOC as *Amici Curiae* 22. Thus, the courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions. *E. g.*, *Anderson* v. *Methodist Evangelical Hospital, Inc.*, 464 F. 2d 723, 725 (CA6 1972).

The EEOC suggests that when a sexual harassment claim rests exclusively on a "hostile environment" theory, however, the usual basis for a finding of agency will often disappear. In that case, the EEOC believes, agency principles lead to

> "a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employee's complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment (obtained, *e. g.*, by the filing of a charge with the EEOC or a comparable state agency). In all other cases, the employer will be liable if it has actual knowledge of the harassment or if, considering all the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials." Brief for United States and EEOC as *Amici Curiae* 26.

As respondent points out, this suggested rule is in some tension with the EEOC Guidelines, which hold an employer liable for the acts of its agents without regard to notice. 29 CFR § 1604.11(c) (1985). The Guidelines do require, however, an "examin[ation of] the circumstances of the particular employment relationship and the job [f]unctions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity." *Ibid.*

This debate over the appropriate standard for employer liability has a rather abstract quality about it given the state of the record in this case. We do not know at this stage whether Taylor made any sexual advances toward respondent at all, let alone whether those advances were unwelcome, whether they were sufficiently pervasive to constitute a condition of employment, or whether they were "so pervasive and so long continuing . . . that the employer must have become conscious of [them]," *Taylor* v. *Jones*, 653 F. 2d 1193, 1197–1199 (CA8 1981) (holding employer liable for racially hostile working environment based on constructive knowledge).

We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U. S. C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. See generally Restatement (Second) of Agency §§ 219–237 (1958). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability. *Ibid.*

Finally, we reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability. While those facts are plainly relevant, the situation before us demonstrates why they are not necessarily dispositive. Petitioner's general nondiscrimination policy did not address sexual harassment in particular, and thus did not alert employees to their employer's interest in correcting that form of discrimination. App. 25. Moreover, the bank's grievance procedure apparently required an employee to complain first to her supervisor, in this case Taylor. Since Taylor was the alleged perpetrator, it is not altogether surprising that respondent failed to invoke the procedure and report her grievance to him. Petitioner's contention that respondent's failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.

IV

In sum, we hold that a claim of "hostile environment" sex discrimination is actionable under Title VII, that the District Court's findings were insufficient to dispose of respondent's hostile environment claim, and that the District Court did not err in admitting testimony about respondent's sexually provocative speech and dress. As to employer liability, we conclude that the Court of Appeals was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case.

Accordingly, the judgment of the Court of Appeals reversing the judgment of the District Court is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring.

Because I do not see any inconsistency between the two opinions, and because I believe the question of statutory construction that JUSTICE MARSHALL has answered is fairly presented by the record, I join both the Court's opinion and JUSTICE MARSHALL's opinion.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in the judgment.

I fully agree with the Court's conclusion that workplace sexual harassment is illegal, and violates Title VII. Part III of the Court's opinion, however, leaves open the circumstances in which an employer is responsible under Title VII for such conduct. Because I believe that question to be properly before us, I write separately.

The issue the Court declines to resolve is addressed in the EEOC Guidelines on Discrimination Because of Sex, which are entitled to great deference. See *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 433–434 (1971) (EEOC Guidelines on Employment Testing Procedures of 1966); see also *ante*, at 65. The Guidelines explain:

> "Applying general Title VII principles, an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job [f]unctions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.
>
> "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 CFR §§ 1604.11(c),(d) (1985).

The Commission, in issuing the Guidelines, explained that its rule was "in keeping with the general standard of employer liability with respect to agents and supervisory employees. . . . [T]he Commission and the courts have held for years that an employer is liable if a supervisor or an agent violates the Title VII, regardless of knowledge or any other mitigating factor." 45 Fed. Reg. 74676 (1980). I would adopt the standard set out by the Commission.

An employer can act only through individual supervisors and employees; discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors. Although an employer may sometimes adopt companywide discriminatory policies violative of Title VII, acts that may constitute Title VII violations are generally effected through the actions of individuals, and often an individual may take such a step even in defiance of company policy. Nonetheless, Title VII remedies, such as reinstatement and backpay, generally run against the employer as an entity.[1] The question thus arises as to the circumstances under which an employer will be held liable under Title VII for the acts of its employees.

The answer supplied by general Title VII law, like that supplied by federal labor law, is that the act of a supervisory employee or agent is imputed to the employer.[2] Thus, for example, when a supervisor discriminatorily fires or refuses to promote a black employee, that act is, without more, considered the act of the employer. The courts do not stop to consider whether the employer otherwise had "notice" of the action, or even whether the supervisor had actual authority to act as he did. *E. g., Flowers* v. *Crouch-Walker Corp.*,

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[1] The remedial provisions of Title VII were largely modeled on those of the National Labor Relations Act (NLRA). See *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 419, and n. 11 (1975); see also *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 768–770 (1976).

[2] For NLRA cases, see, *e. g., Graves Trucking, Inc.* v. *NLRB*, 692 F. 2d 470 (CA7 1982); *NLRB* v. *Kaiser Agricultural Chemical, Division of Kaiser Aluminum & Chemical Corp.*, 473 F. 2d 374, 384 (CA5 1973); *Amalgamated Clothing Workers of America* v. *NLRB*, 124 U. S. App. D. C. 365, 377, 365 F. 2d 898, 909 (1966).

552 F. 2d 1277, 1282 (CA7 1977); *Young* v. *Southwestern Savings and Loan Assn.*, 509 F. 2d 140 (CA5 1975); *Anderson* v. *Methodist Evangelical Hospital, Inc.*, 464 F. 2d 723 (CA6 1972). Following that approach, every Court of Appeals that has considered the issue has held that sexual harassment by supervisory personnel is automatically imputed to the employer when the harassment results in tangible job detriment to the subordinate employee. See *Horn* v. *Duke Homes, Inc., Div. of Windsor Mobile Homes*, 755 F. 2d 599, 604–606 (CA7 1985); *Craig* v. *Y & Y Snacks, Inc.*, 721 F. 2d 77, 80–81 (CA3 1983); *Katz* v. *Dole*, 709 F. 2d 251, 255, n. 6 (CA4 1983); *Henson* v. *Dundee*, 682 F. 2d 897, 910 (CA11 1982); *Miller* v. *Bank of America*, 600 F. 2d 211, 213 (CA9 1979).

The brief filed by the Solicitor General on behalf of the United States and the EEOC in this case suggests that a different rule should apply when a supervisor's harassment "merely" results in a discriminatory work environment. The Solicitor General concedes that sexual harassment that affects tangible job benefits is an exercise of authority delegated to the supervisor by the employer, and thus gives rise to employer liability. But, departing from the EEOC Guidelines, he argues that the case of a supervisor merely creating a discriminatory work environment is different because the supervisor "is not exercising, or threatening to exercise, actual or apparent authority to make personnel decisions affecting the victim." Brief for United States and EEOC as *Amici Curiae* 24. In the latter situation, he concludes, some further notice requirement should therefore be necessary.

The Solicitor General's position is untenable. A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace. There is no reason why abuse of the latter authority should have different consequences than abuse of the former. In both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates. There is therefore no justification for a special rule, to be applied *only* in "hostile environment" cases, that sexual harassment does not create employer liability until the employee suffering the discrimination notifies other supervisors. No such requirement appears in the statute, and no such requirement can coherently be drawn from the law of agency.

Agency principles and the goals of Title VII law make appropriate some limitation on the liability of employers for the acts of supervisors. Where, for example, a supervisor has no authority over an employee, because the two work in wholly different parts of the employer's business, it may be improper to find strict employer liability. See 29 CFR § 1604.11(c) (1985). Those considerations, however, do not justify the creation of a special "notice" rule in hostile environment cases.

Further, nothing would be gained by crafting such a rule. In the "pure" hostile environment case, where an employee files an EEOC complaint alleging sexual harassment in the workplace, the employee seeks not money damages but injunctive relief. See *Bundy* v. *Jackson*, 205 U. S. App. D. C. 444, 456, n. 12, 641 F. 2d 934, 946, n. 12 (1981). Under Title VII, the EEOC must notify an employer of charges made against it within 10 days after receipt of the complaint. 42 U. S. C. § 2000e–5(b). If the charges appear to be based on "reasonable cause," the EEOC must attempt to eliminate the offending practice through "informal methods of conference, conciliation, and persuasion." *Ibid.* An employer whose internal procedures assertedly would have redressed the discrimination can avoid injunctive relief by employing these procedures after receiving notice of the complaint or during the conciliation period. Cf. Brief for United

States and EEOC as *Amici Curiae* 26. Where a complainant, on the other hand, seeks backpay on the theory that a hostile work environment effected a constructive termination, the existence of an internal complaint procedure may be a factor in determining not the employer's liability but the remedies available against it. Where a complainant without good reason bypassed an internal complaint procedure she knew to be effective, a court may be reluctant to find constructive termination and thus to award reinstatement or backpay.

I therefore reject the Solicitor General's position. I would apply in this case the same rules we apply in all other Title VII cases, and hold that sexual harassment by a supervisor of an employee under his supervision, leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes regardless of whether the employee gave "notice" of the offense.

McMILLAN ET AL. v. PENNSYLVANIA

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

No. 85-215. Argued March 4, 1986—Decided June 19, 1986

Pennsylvania's Mandatory Minimum Sentencing Act (Act) provides that anyone convicted of certain enumerated felonies is subject to a mandatory minimum sentence of five years' imprisonment if the sentencing judge—upon considering the evidence introduced at the trial and any additional evidence offered by either the defendant or the Commonwealth at the sentencing hearing—finds, by a preponderance of the evidence, that the defendant "visibly possessed a firearm" during the commission of the offense. The Act, which also provides that visible possession shall not be an element of the crime, operates to divest the judge of discretion to impose any sentence of less than five years for the underlying felony, but does not authorize a sentence in excess of that otherwise allowed for the offense. Each of the petitioners was convicted of one of the Act's enumerated felonies, and in each case the Commonwealth gave notice that at sentencing it would seek to proceed under the Act. However, each of the sentencing judges found the Act unconstitutional and imposed a lesser sentence than that required by the Act. The Pennsylvania Supreme Court consolidated the Commonwealth's appeals, vacated petitioners' sentences, and remanded for sentencing pursuant to the Act. The court held that the Act was consistent with due process, rejecting petitioners' principal argument that visible possession of a firearm was an element of the crimes for which they were sentenced and thus must be proved beyond a reasonable doubt under *In re Winship*, 397 U. S. 358, and *Mullaney* v. *Wilbur*, 421 U. S. 684.

Held:

1. A State may properly treat visible possession of a firearm as a sentencing consideration rather than an element of a particular offense that must be proved beyond a reasonable doubt. This case is controlled by *Patterson* v. *New York*, 432 U. S. 197, which rejected a claim that whenever a State links the "severity of punishment" to the "presence or absence of an identified fact" the State must prove that fact beyond a reasonable doubt. While there are constitutional limits beyond which the States may not go in this regard, the applicability of the reasonable-doubt standard is usually dependent on how a State defines the offense that is charged in any given case. Here, the Pennsylvania Legislature has made visible possession of a firearm a sentencing factor that comes into play only after the defendant has been found guilty of one of the

enumerated crimes beyond a reasonable doubt, and the constitutional limits to a State's power are not exceeded by the Act, which only raises the minimum sentence that may be imposed and neither alters the maximum sentence nor creates a separate offense calling for a separate penalty. *Specht* v. *Patterson*, 386 U. S. 605, distinguished. Pp. 84–91.

2. There is no merit to petitioners' contention that even though States may treat visible possession of a firearm as a sentencing consideration rather than an element of a particular offense, due process nonetheless requires that visible possession be proved by at least clear and convincing evidence. The preponderance standard satisfies due process. Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all. Nothing in Pennsylvania's scheme warrants constitutionalizing burdens of proof at sentencing. Pp. 91–93.

3. Nor is there merit to petitioners' claim that the Act denies them their Sixth Amendment right to a trial by jury. There is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact. P. 93.

508 Pa. 25, 494 A. 2d 354, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 93. STEVENS, J., filed a dissenting opinion, *post*, p. 95.

Leonard N. Sosnov argued the cause for petitioners. With him on the briefs were *John W. Packel*, *David Rudovsky*, and *Gerald A. Stein*.

Steven J. Cooperstein argued the cause for respondent. With him on the brief were *Gaele McLaughlin Barthold*, *Harriet R. Brumberg*, *Eric B. Henson*, and *William G. Chadwick, Jr.*

JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari to consider the constitutionality, under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, of Pennsylvania's Mandatory Minimum Sentencing Act, 42 Pa. Cons. Stat. § 9712 (1982) (the Act).

I

The Act was adopted in 1982. It provides that anyone convicted of certain enumerated felonies is subject to a mandatory minimum sentence of five years' imprisonment if the sentencing judge finds, by a preponderance of the evidence, that the person "visibly possessed a firearm" during the commission of the offense. At the sentencing hearing, the judge is directed to consider the evidence introduced at trial and any additional evidence offered by either the defendant or the Commonwealth. § 9712(b).[1] The Act operates to divest

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[1] Section 9712 provides in full:

"(a) Mandatory sentence.—Any person who is convicted in any court of this Commonwealth of murder of the third degree, voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery as defined in 18 Pa. C. S. § 3701(a)(1)(i), (ii) or (iii) (relating to robbery), aggravated assault as defined in 18 Pa. C. S. § 2702(a)(1) (relating to aggravated assault) or kidnapping, or who is convicted of attempt to commit any of these crimes, shall, if the person visibly possessed a firearm during the commission of the offense, be sentenced to a minimum sentence of at least five years of total confinement notwithstanding any other provision of this title or other statute to the contrary.

"(b) Proof at sentencing.—Provisions of this section shall not be an element of the crime and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

"(c) Authority of court in sentencing.—There shall be no authority in any court to impose on an offender to which this section is applicable any lesser sentence than provided for in subsection (a) or to place such offender on probation or to suspend sentence. Nothing in this section shall prevent the sentencing court from imposing a sentence greater than that provided in this section. Sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing shall not supersede the mandatory sentences provided in this section.

"(d) Appeal by Commonwealth.—If a sentencing court refuses to apply this section where applicable, the Commonwealth shall have the right to the judge of discretion to impose any sentence of less than five years for the underlying felony; it does not authorize a sentence in excess of that otherwise allowed for that offense.

Each petitioner was convicted of, among other things, one of § 9712's enumerated felonies. Petitioner McMillan, who shot his victim in the right buttock after an argument over a debt, was convicted by a jury of aggravated assault. Petitioner Peterson shot and killed her husband and, following a bench trial, was convicted of voluntary manslaughter. Petitioner Dennison shot and seriously wounded an acquaintance and was convicted of aggravated assault after a bench trial. Petitioner Smalls robbed a seafood store at gunpoint; following a bench trial he was convicted of robbery. In each case the Commonwealth gave notice that at sentencing it would seek to proceed under the Act. No § 9712 hearing was held, however, because each of the sentencing judges before whom petitioners appeared found the Act unconstitutional; each imposed a lesser sentence than that required by the Act.[2]

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appellate review of the action of the sentencing court. The appellate court shall vacate the sentence and remand the case to the sentencing court for imposition of a sentence in accordance with this section if it finds that the sentence was imposed in violation of this section.

"(e) Definition of firearm.—As used in this section 'firearm' means any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive or the expansion of gas therein."

[2] McMillan was sentenced to a term of 3 to 10 years for aggravated assault; he was also convicted of possession of instruments of crime, 18 Pa. Cons. Stat. § 2503 (1982), for which he received a concurrent term of 2½ to 5 years. Peterson received a sentence of 1 to 6 years on the manslaughter charge, as well as a concurrent term of 6 to 18 months for possession of instruments of crime. Dennison received concurrent sentences of 11½ to 23 months for aggravated assault and possession of instruments of crime. Smalls was sentenced to concurrent 4- to 8-year terms for robbery and criminal conspiracy; he was also convicted of violating the Uniform Firearms Act, § 6101 *et seq.*, and reckless endangerment, § 2705, for which he was sentenced to concurrent terms of 2½ to 5 years and 1 to 2 years respectively. He received a suspended sentence for possession of instruments of crime.

The Commonwealth appealed all four cases to the Supreme Court of Pennsylvania. That court consolidated the appeals and unanimously concluded that the Act is consistent with due process. *Commonwealth* v. *Wright*, 508 Pa. 25, 494 A. 2d 354 (1985). Petitioners' principal argument was that visible possession of a firearm is an element of the crimes for which they were being sentenced and thus must be proved beyond a reasonable doubt under *In re Winship*, 397 U. S. 358 (1970), and *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975). After observing that the legislature had expressly provided that visible possession "shall not be an element of the crime," § 9712(b), and that the reasonable-doubt standard "'has always been dependent on how a state defines the offense'" in question, 508 Pa., at 34, 494 A. 2d, at 359, quoting *Patterson* v. *New York*, 432 U. S. 197, 211, n. 12 (1977), the court rejected the claim that the Act effectively creates a new set of upgraded felonies of which visible possession is an "element." Section 9712, which comes into play only after the defendant has been convicted of an enumerated felony, neither provides for an increase in the maximum sentence for such felony nor authorizes a separate sentence; it merely requires a minimum sentence of five years, which may be more or less than the minimum sentence that might otherwise have been imposed. And consistent with *Winship*, *Mullaney*, and *Patterson*, the Act "creates no presumption as to any essential fact and places no burden on the defendant"; it "in no way relieve[s] the prosecution of its burden of proving guilt." 508 Pa., at 35, 494 A. 2d, at 359.

Petitioners also contended that even if visible possession is not an element of the offense, due process requires more than proof by a preponderance of the evidence. The Supreme Court of Pennsylvania rejected this claim as well, holding that the preponderance standard satisfies due process under the approach set out in *Addington* v. *Texas*, 441 U. S. 418 (1979). The Commonwealth's interest in deterring the illegal use of firearms and in sure punishment for those who commit crimes with guns is as compelling as a convicted defendant's contervailing liberty interest, which has been substantially diminished by a guilty verdict. Moreover, the risk of error in the context of a § 9712 proceeding is comparatively slight—visible possession is a simple, straightforward issue susceptible of objective proof. On balance, the court concluded, it is reasonable for the defendant and the Commonwealth to share equally in any risk of error. The court vacated petitioners' sentences and remanded for sentencing pursuant to the Act. One justice concurred and filed a separate opinion.

We granted certiorari, 474 U. S. 815 (1985), and now affirm.

II

Petitioners argue that under the Due Process Clause as interpreted in *Winship* and *Mullaney*, if a State wants to punish visible possession of a firearm it must undertake the burden of proving that fact beyond a reasonable doubt. We disagree. *Winship* held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U. S., at 364. In *Mullaney* v. *Wilbur*, we held that the Due Process Clause "requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." 421 U. S., at 704. But in *Patterson* we rejected the claim that whenever a State links the "severity of punishment" to "the presence or absence of an identified fact" the State must prove that fact beyond a reasonable doubt. 432 U. S., at 214; see also *id.*, at 207 (State need not "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment"). In particular, we upheld against a due process challenge New York's law placing on defendants charged with murder the burden of proving the affirmative defense of extreme emotional disturbance.

Patterson stressed that in determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive: "[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements *included in the definition of the offense* of which the defendant is charged." *Id.*, at 210 (emphasis added). While "there are obviously constitutional limits beyond which the States may not go in this regard," *ibid.*, "[t]he applicability of the reasonable-doubt standard . . . has always been dependent on how a State defines the offense that is charged in any given case," *id.*, at 211, n. 12. *Patterson* rests on a premise that bears repeating here:

> "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, *Irvine* v. *California*, 347 U. S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Speiser* v. *Randall*, 357 U. S. 513, 523 (1958)." *Id.*, at 201–202 (citations omitted).

We believe that the present case is controlled by *Patterson*, our most recent pronouncement on this subject, rather than by *Mullaney*. As the Supreme Court of Pennsylvania observed, the Pennsylvania Legislature has expressly provided that visible possession of a firearm is not an element of the crimes enumerated in the mandatory sentencing statute, § 9712(b), but instead is a sentencing factor that comes into play only after the defendant has been found guilty of one of those crimes beyond a reasonable doubt. Indeed, the elements of the enumerated offenses, like the maximum permissible penalties for those offenses, were established long before the Mandatory Minimum Sentencing Act was passed.[3] While visible possession might well have been included as an element of the enumerated offenses, Pennsylvania chose not to redefine those offenses in order to so include it, and *Patterson* teaches that we should hesitate to conclude that due process bars the State from pursuing its chosen course in the area of defining crimes and prescribing penalties.

As *Patterson* recognized, of course, there are constitutional limits to the State's power in this regard; in certain limited circumstances *Winship*'s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged. Petitioners argue that Pennsylvania has gone beyond those limits and that its formal provision that visible possession is not an element of the crime is therefore of no effect. We do not think so. While we have never attempted to define precisely the constitutional limits noted in *Patterson, i. e.*, the extent to which due process forbids the reallocation or reduction of burdens of proof in criminal cases, and do not do so today, we are persuaded by several factors that Pennsylvania's Mandatory Minimum Sentencing Act does not exceed those limits.

We note first that the Act plainly does not transgress the limits expressly set out in *Patterson*. Responding to the concern that its rule would permit States unbridled power to redefine crimes to the detriment of criminal defendants, the *Patterson* Court advanced the unremarkable proposition that the Due Process Clause precludes States from discarding the presumption of innocence:

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[3] The elements of the enumerated offenses were established in essentially their present form in 1972. See 1972 Pa. Laws No. 334, which compiled, amended, and codified the Pennsylvania "Crimes Code." The Mandatory Minimum Sentencing Act was passed in 1982.

> "'[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' *McFarland* v. *American Sugar Rfg. Co.*, 241 U. S. 79, 86 (1916). The legislature cannot 'validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt.' *Tot* v. *United States*, 319 U. S. 463, 469 (1943)." *Patterson*, 432 U. S., at 210.

Here, of course, the Act creates no presumptions of the sort condemned in *McFarland* v. *American Sugar Rfg. Co.*, 241 U. S. 79 (1916) (presumption from price sugar refiner paid for sugar that refiner was party to a monopoly), or *Tot* v. *United States*, 319 U. S. 463 (1943) (presumption that convicted felon who possessed a weapon obtained it in interstate commerce). Nor does it relieve the prosecution of its burden of proving guilt; § 9712 only becomes applicable after a defendant has been duly convicted of the crime for which he is to be punished.

The Court in *Mullaney* observed, with respect to the main criminal statute invalidated in that case, that once the State proved the elements which Maine required it to prove beyond a reasonable doubt the defendant faced "a differential in sentencing ranging from a nominal fine to a mandatory life sentence." 421 U. S., at 700. In the present case the situation is quite different. Of the offenses enumerated in the Act, third-degree murder, robbery as defined in 18 Pa. Cons. Stat. § 3701(a)([illegible] 1982), kidnaping, rape, and involuntary deviate sexual intercourse are first-degree felonies subjecting the defendant to a maximum of 20 years' imprisonment. § 1103(1). Voluntary manslaughter and aggravated assault as defined in § 2702(a)(1) are felonies of the second degree carrying a maximum sentence of 10 years. § 1103(2). Section 9712 neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. Section 9712 "ups the ante" for the defendant only by raising to five years the minimum sentence which may be imposed within the statutory plan.[4] The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense. Petitioners' claim that visible possession under the Pennsylvania statute is "really" an element of the offenses for which they are being punished—that Pennsylvania has in effect defined a new set of upgraded felonies—would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment, cf. 18 U. S. C. § 2113(d) (providing separate and greater punishment for bank robberies accomplished through "use of a dangerous weapon or device"), but it does not.

Petitioners contend that this Court's decision in *Specht* v. *Patterson*, 386 U. S. 605 (1967), requires the invalidation of the Pennsylvania statute challenged here. Again, we think petitioners simply read too much into one of our previous decisions. Under the Colorado scheme at issue in *Specht*, conviction of a sexual offense otherwise carrying a maximum penalty of 10 years exposed a defendant to an indefinite term to and including life imprisonment if the sentencing judge made a post-trial finding that the defendant posed "a threat of bodily harm to members of the public, or is an habitual offender and mentally ill," *id.*, at 607. This finding could be made, without notice or any "hearing in the normal sense," based solely on a presentence psychiatric report. *Id.*, at 608. This Court held that the Colorado scheme failed to satisfy the requirements of due process, and that the defendant had a right to be present with counsel, to be heard, to be confronted with and to cross-examine the witnesses against him, and to offer evidence of his own.

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[4] By prescribing a mandatory minimum sentence, the Act incidentally serves to restrict the sentencing court's discretion in setting a maximum sentence. Pennsylvania law provides that a minimum sentence of confinement "shall not exceed one-half of the maximum sentence imposed." 42 Pa. Cons. Stat. § 9756(b) (1982). Thus, the shortest maximum term permissible under the Act is 10 years.

Petitioners suggest that had *Winship* already been decided at the time of *Specht*, the Court would have also required that the burden of proof as to the post-trial findings be beyond a reasonable doubt. But even if we accept petitioners' hypothesis, we do not think it avails them here. The Court in *Specht* observed that following trial the Colorado defendant was confronted with "a radically different situation" from the usual sentencing proceeding. The same simply is not true under the Pennsylvania statute. The finding of visible possession of a firearm of course "ups the ante" for a defendant, or it would not be challenged here; but it does so only in the way that we have previously mentioned, by raising the minimum sentence that may be imposed by the trial court.

Finally, we note that the specter raised by petitioners of States restructuring existing crimes in order to "evade" the commands of *Winship* just does not appear in this case.[5] As noted above, § 9712's enumerated felonies retain the same elements they had before the Mandatory Minimum Sentencing Act was passed. The Pennsylvania Legislature did not change the definition of any existing offense. It simply took one factor that has always been considered by sentencing courts to bear on punishment—the instrumentality used in committing a violent felony—and dictated the precise weight to be given that factor if the instrumentality is a firearm. Pennsylvania's decision to do so has not transformed against its will a sentencing factor into an "element" of some hypothetical "offense."

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[5] We reject the view that anything in the Due Process Clause bars States from making changes in their criminal law that have the effect of making it easier for the prosecution to obtain convictions. "From the vantage point of the Constitution, a change in law favorable to defendants is not necessarily good, nor is an innovation favorable to the prosecution necessarily bad." Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L. J. 1325, 1361 (1979).

Petitioners seek support for their due process claim by observing that many legislatures have made possession of a weapon an element of various aggravated offenses.[6] But the fact that the States have formulated different statutory schemes to punish armed felons is merely a reflection of our federal system, which demands "[t]olerance for a spectrum of state procedures dealing with a common problem of law enforcement," *Spencer* v. *Texas*, 385 U. S. 554, 566 (1967). That Pennsylvania's particular approach has been adopted in few other States does not render Pennsylvania's choice unconstitutional.[7] See *Patterson*, 432 U. S., at 211; cf. *Spaziano* v. *Florida*, 468 U. S. 447, 464 (1984). Nor does the historical test advanced by the *Patterson* dissent, on which petitioners apparently also rely, materially advance their cause. While it is surely true that "[f]or hundreds of years some offenses have been considered more serious and the punishment made more severe if the offense was committed with a weapon or while armed," Brief for Petitioners 17, n. 11, petitioners do not contend that the particular factor made relevant here—visible possession of a firearm—has historically been treated "in the Anglo-American legal tradition" as requiring proof beyond a reasonable doubt, *Patterson*, 432 U. S., at 226 (POWELL, J., dissenting). See also *id.*, at 229,

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[6] The Commonwealth argues that the statutes on which petitioners rely typically differ from that at issue here. In particular, most of the statutes are directed at all deadly weapons rather than just firearms, and most treat the armed crime as a higher grade of offense than the unarmed crime. Brief for Respondent 11.

[7] At least two States—New Jersey, see N. J. Stat. Ann. § 2C:43–6c (West 1982); *State* v. *Gantt*, 186 N. J. Super. 262, 452 A. 2d 477 (1982), aff'd, 195 N. J. Super. 144, 478 A. 2d 422 (App. Div. 1984), and Kansas, see Kan. Stat. Ann. § 21–4618 (1981); *State* v. *Mullins*, 223 Kan. 798, 577 P. 2d 51 (1978)—have statutory schemes similar to Pennsylvania's.

n. 14 (POWELL, J., dissenting) (approving new scheme under which State put burden on armed robbery defendant to prove that gun was unloaded or inoperative in order to receive lower sentence).

We have noted a number of differences between this case and *Winship*, *Mullaney*, and *Specht*, and we find these differences controlling here. Our inability to lay down any "bright line" test may leave the constitutionality of statutes more like those in *Mullaney* and *Specht* than is the Pennsylvania statute to depend on differences of degree, but the law is full of situations in which differences of degree produce different results. We have no doubt that Pennsylvania's Mandatory Minimum Sentencing Act falls on the permissible side of the constitutional line.

III

Having concluded that States may treat "visible possession of a firearm" as a sentencing consideration rather than an element of a particular offense, we now turn to petitioners' subsidiary claim that due process nonetheless requires that visible possession be proved by at least clear and convincing evidence. Like the court below, we have little difficulty concluding that in this case the preponderance standard satisfies due process. Indeed, it would be extraordinary if the Due Process Clause as understood in *Patterson* plainly sanctioned Pennsylvania's scheme, while the same Clause explained in some other line of less clearly relevant cases imposed more stringent requirements. There is, after all, only one Due Process Clause in the Fourteenth Amendment. Furthermore, petitioners do not and could not claim that a sentencing court may never rely on a particular fact in passing sentence without finding that fact by "clear and convincing evidence." Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all. See *Williams* v. *New York*, 337 U. S. 241 (1949). Pennsylvania has deemed a particular fact relevant and prescribed a particular burden of proof. We see nothing in Pennsylvania's scheme that would warrant constitutionalizing burdens of proof at sentencing.[8]

Petitioners apparently concede that Pennsylvania's scheme would pass constitutional muster if only it did not remove the sentencing court's discretion, *i. e.*, if the legislature had simply directed the court to *consider* visible possession in passing sentence. Brief for Petitioners 31–32. We have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance. Nor is there merit to the claim that a heightened burden of proof is required because visible possession is a fact "concerning the crime committed" rather than the background or character of the defendant. *Ibid.* Sentencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment, and we have consistently approved sentencing schemes that mandate consideration of facts related to the crime, *e. g.*, *Proffitt* v. *Florida*, 428 U. S. 242 (1976), without suggesting that those facts must be proved beyond a reasonable doubt. The Courts of Appeals have uniformly rejected due process challenges to the preponderance standard under the federal "dangerous special offender" statute, 18

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[8] *Addington* v. *Texas*, 441 U. S. 418 (1979), and *Santosky* v. *Kramer*, 455 U. S. 745 (1982), which respectively applied the "clear and convincing evidence" standard where the State sought involuntary commitment to a mental institution and involuntary termination of parental rights, are not to the contrary. Quite unlike the situation in those cases, criminal sentencing takes place only after a defendant has been adjudged guilty beyond a reasonable doubt. Once the reasonable-doubt standard has been applied to obtain a valid conviction, "the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him." *Meachum* v. *Fano*, 427 U. S. 215, 224 (1976). As noted in text, sentencing courts have always operated without constitutionally imposed burdens of proof; embracing petitioners' suggestion that we apply the clear-and-convincing standard here would significantly alter criminal sentencing, for we see no way to distinguish the visible possession finding at issue here from a host of other express or implied findings sentencing judges typically make on the way to passing sentence.

U. S. C. § 3575, which provides for an enhanced sentence if the court concludes that the defendant is both "dangerous" and a "special offender." See *United States* v. *Davis*, 710 F. 2d 104, 106 (CA3) (collecting cases), cert. denied, 464 U. S. 1001 (1983).

IV

In light of the foregoing, petitioners' final claim—that the Act denies them their Sixth Amendment right to a trial by jury—merits little discussion. Petitioners again argue that the jury must determine all ultimate facts concerning the offense committed. Having concluded that Pennsylvania may properly treat visible possession as a sentencing consideration and not an element of any offense, we need only note that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact. See *Spaziano* v. *Florida*, 468 U. S., at 459.

For the foregoing reasons, the judgment of the Supreme Court of Pennsylvania is affirmed.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

I agree with much in JUSTICE STEVENS' dissent, *post*, at 96–98. Whether a particular fact is an element of a criminal offense that, under *In re Winship*, 397 U. S. 358 (1970), must be proved by the prosecution beyond a reasonable doubt is a question that must be decided by this Court and cannot be abdicated to the States. "[I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law." *Mullaney* v. *Wilbur*, 421 U. S. 684, 698 (1975). The deference that the majority gives to the Pennsylvania Legislature's statement that the visible possession of a firearm should not be considered an element of the crime defined by 42 Pa. Cons. Stat. § 9712 (1982) is thus wholly inappropriate.

I would not, however, rely in this case on the formalistic distinction between aggravating and mitigating facts. The "continued functioning of the democratic process," *post*, at 100 (STEVENS, J., dissenting), might provide us with some assurance that States will not circumvent the guarantee of *Winship* by criminalizing seemingly innocuous conduct and then placing the burden on the defendant to establish an affirmative defense. But this Court nonetheless must remain ready to enforce that guarantee should the State, by placing upon the defendant the burden of proving certain mitigating facts, effectively lighten the constitutional burden of the prosecution with respect to the elements of the crime. See *Patterson* v. *New York*, 432 U. S. 197, 206–207 (1977) (allowing State to require defendant to prove extreme emotional disturbance by preponderance of the evidence but noting that this affirmative defense "does not serve to negative any facts of the crime which the State is to prove in order to convict of murder").

I would put off until next Term any discussion of how mitigating facts should be analyzed under *Winship*. This issue will be aired when the Court considers *Martin* v. *Ohio*, No. 85–6461, cert. granted, 475 U. S. 1119 (1986), in which a defendant challenges Ohio's requirement that the accused bear the burden of proving a claim of self-defense by a preponderance of the evidence. For now, it is enough to agree with JUSTICE STEVENS that "if a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a 'fact necessary to constitute the crime' within the meaning of our holding in *In re Winship*," *post*, at 103. Pennsylvania has attached just such consequences to a finding that a defendant "visibly possessed a firearm" during the commission of any aggravated assault, and, under *Winship*, the prosecution should not be relieved of proving that fact beyond a reasonable doubt. I dissent.

JUSTICE STEVENS, dissenting.

Petitioner Dennison, a 73-year-old man, committed an aggravated assault upon a neighborhood youth whom he suspected of stealing money from his house. After a trial at which the Commonwealth proved the elements of the offense of aggravated assault beyond a reasonable doubt, the trial judge imposed a sentence of imprisonment of 11½ to 23 months. Because he had concluded that Pennsylvania's recently enacted Mandatory Minimum Sentencing Act, 42 Pa. Cons. Stat. § 9712 (1982), was unconstitutional, the trial judge refused to impose the 5-year minimum sentence mandated by that Act whenever the Commonwealth proves—by a preponderance of the evidence—that the defendant "visibly possessed a firearm during the commission of the offense," § 9712(b).

The judge presiding over Dennison's trial, as well as the judges in the other three petitioners' trials and the Superior Court Judges hearing the appeals, all concluded that visible possession of a firearm was an element of the offense. "'Visibly possessed a firearm' is inarguably language which refers to behavior which the legislature intended to prohibit." App. to Pet. for Cert. A35. As a consequence, the prohibited conduct had to be established by proof beyond a reasonable doubt. The Pennsylvania Supreme Court agreed that visible possession of a firearm is conduct that the Pennsylvania General Assembly intended to prohibit, *Commonwealth* v. *Wright*, 508 Pa. 25, 42, 494 A. 2d 354, 363 (1985) (Larsen, J., concurring); *id.*, at 49, 494 A. 2d, at 366 (concurring opinion joined by the majority opinion), and it recognized that evidence of such conduct would mandate a *minimum* sentence of imprisonment more than twice as severe as the *maximum* the trial judge would otherwise have imposed on petitioner Dennison, *id.*, at 29, n. 1, 494 A. 2d, at 356, n. 1. But it nonetheless held that visible possession of a firearm was not an element of the offense because the Pennsylvania

General Assembly had the foresight to declare in § 9712(b) that "Provisions of this section shall not be an element of the crime."

It is common ground that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Patterson* v. *New York*, 432 U. S. 197, 210 (1977). Today the Court holds that state legislatures may not only define the offense with which a criminal defendant is charged, but may also authoritatively determine that the conduct so described—*i. e.*, the prohibited activity which subjects the defendant to criminal sanctions—is *not* an element of the crime which the Due Process Clause requires to be proved by the prosecution beyond a reasonable doubt. In my view, a state legislature may not dispense with the requirement of proof beyond a reasonable doubt for conduct that it targets for severe criminal penalties. Because the Pennsylvania statute challenged in this case describes conduct that the Pennsylvania Legislature obviously intended to prohibit, and because it mandates lengthy incarceration for the same, I believe that the conduct so described is an element of the criminal offense to which the proof beyond a reasonable doubt requirement applies.

Once a State defines a criminal offense, the Due Process Clause requires it to prove any component of the prohibited transaction that gives rise to both a special stigma and a special punishment beyond a reasonable doubt. This much has been evident at least since *In re Winship*, 397 U. S. 358 (1970). In that case, the Court "explicitly" held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.*, at 364. In reasoning to this conclusion the Court reviewed the heritage of the rule that Justice Frankfurter characterized as "basic in our law and rightly one of the boasts of a free society,"[1] and—of critical importance to the decision before us—explained the reasons that undergird the rule:

> "The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' *Coffin* v. *United States*, [156 U. S. 432,] 453 [1895]. As the dissenters in the New York Court of Appeals observed, and we agree, 'a person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.' 24 N. Y. 2d [196], 205, 247 N. E. 2d [253], 259 [1969].
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> "The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." *Id.*, at 363–364.

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[1] *Leland* v. *Oregon*, 343 U. S. 790, 803 (1952) (Frankfurter, J., dissenting). Later in his opinion he noted that the "duty of the State of establishing every fact of the equation which adds up to a crime, and of establishing it to the satisfaction of a jury beyond a reasonable doubt is the decisive difference between criminal culpability and civil liability." *Id.*, at 805.

In re Winship thus took a purposive approach to the constitutional standard of proof: when the State threatens to stigmatize or incarcerate an individual for engaging in prohibited conduct, it may do so only if it proves the elements of the prohibited transaction beyond a reasonable doubt.[2]

It is true, as the Court points out, that "'[t]he applicability of the reasonable-doubt standard . . . has always been dependent on how a State defines the offense that is charged in any given case.'" See *ante*, at 85 (quoting *Patterson* v. *New York*, 432 U. S., at 211, n. 12). A State's freedom in this regard, however, has always been understood to reflect the uncontroversial proposition that a State has power, subject of course to constitutional limits, to attach criminal penalties to a wide variety of objectionable transactions; when it does so, the prosecution need establish beyond a reasonable doubt only the constituent elements of the specified criminal transaction. Nothing in *Patterson* or any of its predecessors authorizes a State to decide for itself which of the ingredients of the prohibited transaction are "elements" that it must prove beyond a reasonable doubt at trial.

Indeed, contrary to the supposition of the majority, *Patterson* v. *New York* is entirely in keeping with the limit on state definitional power implied in *Winship*. Patterson was charged with second-degree murder, a crime which in New York included two elements: "'intent to cause the death of another person'" and "'caus[ing] the death of such person or of a third person.'" 432 U. S., at 198 (quoting N. Y. Penal Law § 125.25 (McKinney 1975)). "Malice aforethought [was] not an element of the crime." 432 U. S., at 198. Because

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[2] "The combination of stigma and loss of liberty involved in a conditional or absolute sentence of imprisonment sets that sanction apart from anything else the law imposes." Packer, *Mens Rea* and the Supreme Court, 1962 S. Ct. Rev. 107, 150. The requirement that conduct subjecting an individual to a special stigma and a special punishment be proved beyond a reasonable doubt therefore casts no doubt on the constitutionality of criminal restitution ordered on a lesser standard of proof.

"causing the death of another person with intent to do so," *id.*, at 205, was "an act which . . . the State may constitutionally criminalize and punish," *id.*, at 209; accord, *id.*, at 208, and because New York in fact proscribed and punished that conduct, *id.*, at 206, the Court upheld the State's refusal to "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it [was] willing to recognize as an *exculpatory or mitigating circumstance* affecting the degree of culpability or the severity of the punishment," *id.*, at 207 (emphasis added)—in that case, the affirmative defense of extreme emotional disturbance. The Court explained that "the Due Process Clause did not invalidate every instance of burdening the defendant with proving *an exculpatory fact.*" *Id.*, at 203, n. 9 (emphasis added). "To recognize at all a *mitigating circumstance* does not require the State to prove its nonexistence in each case in which the fact is put in issue." *Id.*, at 209 (emphasis added). *Patterson* thus clarified that the Due Process Clause requires proof beyond a reasonable doubt of conduct which exposes a criminal defendent to greater stigma or punishment, but does not likewise constrain state reductions of criminal penalties—even if such reductions are conditioned on a prosecutor's failure to prove a fact by a preponderance of the evidence or on proof supplied by the criminal defendant.[3]

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[3] The *Patterson* Court also recognized other "constitutional limits beyond which the States may not go in this regard," 432 U. S., at 210, citing *Tot* v. *United States*, 319 U. S. 463, 469 (1943), and other cases invalidating statutory presumptions. It was on the basis of these cases that *Patterson* distinguished the Maine statute struck down in *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975). The Maine murder statute prescribed life imprisonment for "Whoever unlawfully kills a human being *with malice aforethought*," Me. Rev. Stat. Ann., Tit. 17, § 2651 (1964) (emphasis added), and the trial judge had charged the jury that "'malice aforethought is an essential and indispensable element of the crime of murder,'" 421 U. S., at 686 (quoting App. in No. 74-13, O. T. 1974, p. 40). Likewise, the Government conceded that the federal enactment in *Tot* proscribed only receipt of firearms in interstate commerce. See *Tot* v. *United States*, 319 U. S., at

The distinction between aggravating and mitigating facts has been criticized as formalistic. But its ability to identify genuine constitutional threats depends on nothing more than the continued functioning of the democratic process. To appreciate the difference between aggravating and mitigating circumstances, it is important to remember that although States may reach the same destination either by criminalizing conduct and allowing an affirmative defense, or by prohibiting lesser conduct and enhancing the penalty, legislation proceeding along these two paths is very different even if it might theoretically achieve the same result. Consider, for example, a statute making presence "in any private or public place" a "felony punishable by up to five years imprisonment" and yet allowing "an affirmative defense for the defendant to prove, to a preponderance of the evidence, that he was not robbing a bank." Dutile, The Burden of Proof in Crimi-

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466. *Patterson* clarified that *Mullaney*, like *Tot*, stood for the proposition that "shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or *presumed* is impermissible under the Due Process Clause." 432 U. S., at 215 (emphasis added). Cf. *United States* v. *Romano*, 382 U. S. 136, 138, 144 (1965). Thus, although Maine could have punished all unlawful, intentional killings with life imprisonment, just as Congress in *Tot* could have punished possession of a firearm by one convicted of a crime of violence, in neither case did the legislature do so. This explanation, although not entirely satisfactory, see *State* v. *Lafferty*, 309 A. 2d 647, 664–665 (Me. 1973); *id.*, at 672–673 (Wernick, J., concurring), is consistent with the Maine Supreme Court's explanation on direct appeal that state law presumed malice. See *State* v. *Wilbur*, 278 A. 2d 139, 145–146 (Me. 1971). The state court downplayed this presumption because "no burden is imposed upon defendant until the State has first convinced the jury beyond a reasonable doubt that defendant is guilty of a voluntary and intentional homicide," at which point the issue "is no longer guilt or innocence of felonious homicide but rather the degree of the homicide." *Id.*, at 146. As we held in *Mullaney*, "[t]he safeguards of due process are not rendered unavailable simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty." 421 U. S., at 698. Accord, *Specht* v. *Patterson*, 386 U. S. 605, 608–611 (1967).

nal Cases: A Comment on the *Mullaney-Patterson* Doctrine, 55 Notre Dame Law. 380, 383 (1980). No democratically elected legislature would enact such a law, and if it did, a broad-based coalition of bankers and bank customers would soon see the legislation repealed.[4] Nor is there a serious danger that a State will soon define murder to be the "mere physical contact between the defendant and the victim leading to the victim's death, but then set up an affirmative defense leaving it to the defendant to prove that he acted without culpable *mens rea.*" *Patterson* v. *New York*, 432 U. S., at 224, n. 8 (POWELL, J., dissenting). No legislator would be willing to expose himself to the severe opprobrium and punishment meted out to murderers for an accidental stumble on the subway. For similar reasons, it can safely be assumed that a State will not "define all assaults as a single offense and then require the defendant to disprove the elements of aggravation." *Mullaney* v. *Wilbur*, 421 U. S. 684, 699,

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[4] Cf. Ashford & Risinger, Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview, 79 Yale L. J. 165, 178 (1969) ("In the first statute, a legislature has deemed three factors germane to punishment: (a) presence of the individual; (b) the presence of narcotics in the house; and (c) the defendant's knowledge. In the second statute, only two factors are deemed germane to whether an individual will be punished: (a) presence of the individual; (b) the presence of narcotics in the house. The electorate might approve of the passage of the first statute, but not the passage of the second. The fact that a legislature might pass the second statute does not mean that, given the political temperament of the state, the legislature would in fact have passed it. If the legislature nominally recognizes knowledge as germane (as it did in the first statute) and further, as the type of germane issue to be proved by the state, and then arranges its process so that most of those who lack knowledge are still sent to jail (as though the second statute had been passed), then those individuals are being punished for a crime which has never undergone the political checks guaranteed by representative government"); Note, The Constitutionality of Affirmative Defenses after *Patterson v. New York*, 78 Colum. L. Rev. 655, 667 (1978) ("[A]lthough a state legislature might have decided to define an offense without the mitigating or exculpatory factor, there is no reason to suppose it would have done so, or given the political climate of the state, could have done so").

n. 24 (1975). The very inconceivability of the hypothesized legislation—all of which has been sincerely offered to illustrate the dangers of permitting legislative mitigation of punishment in derogation of the requirement of proof beyond a reasonable doubt—is reason enough to feel secure that it will not command a majority of the electorate.[5]

It is not at all inconceivable, however, to fear that a State might subject those individuals convicted of engaging in antisocial conduct to further punishment for aggravating conduct not proved beyond a reasonable doubt. As this case demonstrates, a State may seek to enhance the deterrent effect of its law forbidding the use of firearms in the course of felonies by mandating a minimum sentence of imprisonment upon proof by a preponderance against those already convicted of specified crimes. But *In re Winship* and *Patterson* teach that a State may not advance the objectives of its criminal laws at the expense of the accurate factfinding owed to the criminally accused who suffer the risk of nonpersuasion.

It would demean the importance of the reasonable-doubt standard—indeed, it would demean the Constitution itself—if the substance of the standard could be avoided by nothing more than a legislative declaration that prohibited conduct is not an "element" of a crime. A legislative definition of an offense named "assault" could be broad enough to encompass every intentional infliction of harm by one person upon another, but surely the legislature could not provide that only that fact must be proved beyond a reasonable doubt and then specify a range of increased punishments if the prosecution could show by a preponderance of the evidence that the defendant robbed, raped, or killed his victim "during the commission of the offense."

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[5] See J. Ely, Democracy and Distrust 183 (1980) ("constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it can"). See also *id.*, at 182–183.

Appropriate respect for the rule of *In re Winship* requires that there be some constitutional limits on the power of a State to define the elements of criminal offenses. The high standard of proof is required because of the immense importance of the individual interest in avoiding both the loss of liberty and the stigma that results from a criminal conviction. It follows, I submit, that if a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a "fact necessary to constitute the crime" within the meaning of our holding in *In re Winship.*

Pennsylvania's Mandatory Minimum Sentencing Act reflects a legislative determination that a defendant who "visibly possessed a firearm" during the commission of an aggravated assault is more blameworthy than a defendant who did not. A judicial finding that the defendant used a firearm in an aggravated assault places a greater stigma on the defendant's name than a simple finding that he committed an aggravated assault. And not to be overlooked, such a finding with respect to petitioner Dennison automatically mandates a punishment that is more than twice as severe as the *maximum* punishment that the trial judge considered appropriate for his conduct.

It is true, as the Court points out, that the enhanced punishment is within the range that was authorized for any aggravated assault. That fact does not, however, minimize the significance of a finding of visible possession of a firearm whether attention is focused on the stigmatizing or punitive consequences of that finding. See *Mullaney* v. *Wilbur*, 421 U. S., at 697–698.[6] The finding identifies conduct that the legislature specifically intended to prohibit and to punish by a special sanction. In my opinion the constitutional significance of the special sanction cannot be avoided by the cavalier observation that it merely "ups the ante" for the defendant. See *ante*, at 88, 89. No matter how culpable petitioner Dennison may be, the difference between 11½ months and 5 years of incarceration merits a more principled justification than the luck of the draw.

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[6] It is likewise irrelevant that petitioners had first been convicted of predicate felonies. "Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar." *Jackson* v. *Virginia*, 443 U. S. 307, 323–324 (1979). See n. 3, *supra*.

I respectfully dissent.

UNITED STATES *v.* AMERICAN BAR ENDOWMENT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 85-599. Argued April 28, 1986—Decided June 23, 1986

Respondent American Bar Endowment (ABE), a tax-exempt organization, raises money for its charitable work by providing group life, health, accident, and disability insurance policies, underwritten by insurance companies, to its members. Because the members have favorable mortality and morbidity rates, experience-rating results in substantially lower insurance costs than if the insurance were purchased individually. Since the insurance companies' costs of providing insurance to the group are uniformly lower than the annual premiums paid, the companies pay refunds of the excess ("dividends") to ABE that are used for its charitable purposes. Critical to ABE's fundraising efforts is the fact that it requires its members to assign it all dividends as a condition for participating in the insurance program. ABE advises its insured members that each member's share of the dividends, less ABE's administrative costs, constitutes a tax-deductible contribution. In 1980, the Internal Revenue Service (IRS) advised ABE that it considered ABE's insurance plan an "unrelated trade or business" and that hence the profits thereon were subject to income tax under §§ 511-513 of the Internal Revenue Code. Accordingly, the IRS assessed a tax deficiency on ABE's net revenues from the insurance program for 1979 and 1980. ABE paid these taxes, as well as taxes on its 1981 revenues, and, after exhausting administrative remedies, brought an action for a refund in the Claims Court as did the individual respondent ABE members who claimed that they were entitled to charitable deductions for part of the insurance premiums they paid. The suits were consolidated, and the Claims Court entered judgment for ABE but found for the Government on the individual respondents' claims. The Court of Appeals affirmed as to ABE's taxes but reversed as to the individual respondents and remanded for further factfinding.

Held:

1. ABE's insurance program, as constituting both "the sale of goods" and "the performance of services," is a "trade or business" for purposes of the unrelated business income tax. This case presents an example of precisely the sort of unfair competition between tax-exempt organizations and taxable businesses that Congress intended to prevent by pro-

viding for the unrelated business income tax. The undisputed facts do not support the inference that the dividends ABE receives are charitable contributions from its members rather than profits from its insurance program. Pp. 109–116.

2. The individual respondent taxpayers have not established that any portion of their premium payments to ABA constitutes a charitable contribution. To be entitled to a deduction for a charitable contribution where he has made a payment having the "dual character" of a purchase and a contribution, a taxpayer must at a minimum demonstrate that he purposely contributed money or property in excess of the value of any benefit he received in return. Here, the most logical test of the value of the insurance policies the individual respondents received is the cost of similar policies. None of these respondents have demonstrated that they could have purchased similar policies for a lower cost. Pp. 116–118.

761 F. 2d 1573, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 119. POWELL and O'CONNOR, JJ., took no part in the consideration or decision of the case.

Albert G. Lauber, Jr., argued the cause for the United States. With him on the briefs were *Solicitor General Fried, Acting Assistant Attorney General Olsen, Gary R. Allen*, and *Robert S. Pomerance*.

Francis M. Gregory, Jr., argued the cause for respondents. With him on the brief were *Randolph W. Thrower, Mac Asbill, Jr.*, and *Sheila J. Carpenter.**

JUSTICE MARSHALL delivered the opinion of the Court.

The first issue in this case is whether income that a tax-exempt charitable organization derives from offering group insurance to its members constitutes "unrelated business income" subject to tax under §§ 511 through 513 of the Internal Revenue Code (Code), 26 U. S. C. §§ 511–513. The second issue is whether the organization's members may claim a charitable deduction for the portion of their premium payments that exceeds the actual cost to the organization of providing insurance.

**Thomas F. Olson* and *Carl G. Borden* filed a brief for the California Farm Bureau Federation as *amicus curiae* urging affirmance.

I

Respondent American Bar Endowment (ABE) is a corporation exempt from taxation under § 501(c)(3) of the Code, which, with certain exceptions not relevant here, exempts organizations "organized and operated exclusively for . . . charitable . . . or educational purposes." ABE's primary purposes are to advance legal research and to promote the administration of justice, and it furthers these goals primarily through the distribution of grants to other charitable and educational groups. All members of the American Bar Association (ABA) are automatically members of ABE. The ABA is exempt from taxation as a "business league" under § 501(c)(6).

ABE raises money for its charitable work by providing group insurance policies, underwritten by major insurance companies, to its members. Approximately 20% of ABE's members participate in the group insurance program, which offers life, health, accident, and disability policies. ABE negotiates premium rates with insurers and chooses which insurers shall provide the policies. It also compiles a list of its own members and solicits them, collects the premiums paid by its members, transmits those premiums to the insurer, maintains files on each policyholder, answers members' questions concerning insurance policies, and screens claims for benefits.

There are two important benefits of purchasing insurance as a group rather than individually. The first is that ABE's size gives it bargaining power that individuals lack. The second is that the group policy is experience rated. This means that the cost of insurance to the group is based on that group's claims experience, rather than general actuarial tables. Because ABA members have favorable mortality and morbidity rates, experience rating results in a substantially lower insurance cost. When ABE purchases a group policy for its members, it pays a negotiated premium to the insurance company. If, as is uniformly true, the insurance company's actual cost of providing insurance to the group is lower than the premium paid in a given year, the insurance company pays a refund of the excess, called a "dividend," to ABE. Critical to ABE's fundraising efforts is the fact that ABE requires its members to agree, as a condition of participating in the group insurance program, that they will permit ABE to keep all of the dividends rather than distributing them pro rata to the insured members.

It would be possible for ABE to negotiate lower premium rates for its members than the rates it has charged throughout the relevant period, and thus receive a lower dividend. However, ABE prices its policies competitively with other insurance policies offered to the public and to ABE members. 761 F. 2d 1573, 1575 (CAFC 1985). In this way ABE is able to generate large dividends to be used for its charitable purposes. In recent years the total amount of dividends has exceeded 40% of the members' premium payments. *Ibid.* ABE advises its insured members that each member's share of the dividends, less ABE's administrative costs, constitutes a tax-deductible contribution from the member to ABE. Thus the after-tax cost of ABE's insurance to its members is less than the cost of a commercial policy with identical coverage and premium rates.

In 1980 the Internal Revenue Service (IRS) advised ABE that it considered ABE's insurance plan an "unrelated trade or business" and that the profits thereon were subject to tax under §§ 511–513. Subsequently IRS audited ABE's tax returns for 1979 and 1980 and assessed a tax deficiency on ABE's net revenues from the insurance program. ABE paid those taxes, as well as taxes on the 1981 revenues. After exhausting administrative remedies, it brought an action for a refund in the Claims Court, arguing that its revenues from the insurance program were not subject to tax. At approximately the same time, the individual respondents, who were participants in the ABE insurance program but who had not originally deducted any part of the insurance premiums as charitable contributions, brought suit for refunds in the Claims Court as well. The individual respondents argued that they were entitled to charitable deductions for a portion of those premium payments. The two suits were consolidated for trial in the Claims Court.

The Claims Court entered judgment for ABE in its suit, finding that ABE's provision of insurance to its members did not constitute a "trade or business" subject to tax. 4 Cl. Ct. 404 (1984). It found for the Government, however, on the individual respondents' claims. The court concluded that a taxpayer may claim a charitable contribution for a portion of a payment for goods or services only when he can show that "he bought goods or services for more than their economic value, with the intention that the excess be used to benefit a charitable enterprise," *id.*, at 415 (citation omitted), and that the individual respondents had not established these facts. The Court of Appeals for the Federal Circuit affirmed as to ABE's taxes. 761 F. 2d, at 1577. As to the individual respondents, however the court reversed and remanded for further factfinding. We granted the Government's petition for certiorari on both issues, 474 U. S. 1004 (1985), and we now reverse.

II

We recently discussed the history and structure of the unrelated business income provisions of the Code in *United States* v. *American College of Physicians*, 475 U. S. 834 (1986). The Code imposes a tax, at ordinary corporate rates, on the income that a tax-exempt organization obtains from an "unrelated trade or business . . . regularly carried on by it." §§ 512(a)(1), 511(a)(1). An "unrelated trade or business" is "any trade or business the conduct of which is not substantially related . . . to the exercise or performance by such organization of its charitable, educational, or other purpose," § 513(a). The Code thus sets up a three-part test.

ABE's insurance program is taxable if it (1) constitutes a trade or business; (2) is regularly carried on; and (3) is not substantially related to ABE's tax-exempt purposes. Treas. Reg. § 1.513–1(a), 26 CFR § 1.513–1(a) (1985); *American College of Physicians, supra*, at 838–839. ABE concedes that the latter two portions of this test are satisfied. 761 F. 2d, at 1576. Its defense is based solely on the proposition that its insurance program does not constitute a trade or business.

A

In the Tax Reform Act of 1969, Pub. L. 91–172, 83 Stat. 487, Congress defined a "trade or business" as "any activity which is carried on for the production of income from the sale of goods or the performance of services," § 513(c). The Secretary of the Treasury has provided further clarification of that definition in Treas. Reg. § 1.513–1(b) (1985), which provides: "in general, any activity of [an exempt] organization which is carried on for the production of income and which otherwise possesses the characteristics required to constitute 'trade or business' within the meaning of section 162" is a trade or business for purposes of 26 U. S. C. §§ 511–513.[1]

ABE's insurance program falls within the literal language of these definitions. ABE's activity is both "the sale of goods" and "the performance of services," and possesses the general characteristics of a trade or business. Certainly the assembling of a group of better-than-average insurance risks, negotiating on their behalf with insurance companies, and administering a group policy are activities that can be—and are—provided by private commercial entities in order to make a profit. ABE itself earns considerable income from its program. Nevertheless, the Claims Court and Court of Appeals concluded that ABE does not carry out its insurance program in order to make a profit. The Claims Court relied on the former Court of Claims holding, in *Disabled American Veterans* v. *United States*, 650 F. 2d 1178, 1187 (1981), that an activity is a trade or business only if "operated in a competitive, commercial manner." See 4 Cl. Ct., at 409. Because ABE does not operate its insurance program in a competitive, commercial manner, the Claims Court decided, that program is not a trade or business. The Court of Appeals adopted this reasoning. 761 F. 2d, at 1577.

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[1] Section 162 permits a taxpayer to deduct "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." Undoubtedly due to the desirability of tax deductions, § 162 has spawned a rich and voluminous jurisprudence. The standard test for the existence of a trade or business for purposes of § 162 is whether the activity "was entered into with the dominant hope and intent of realizing a profit." *Brannen* v. *Commissioner*, 722 F. 2d 695, 704 (CA11 1984) (citation omitted). Thus several Courts of Appeals have adopted the "profit motive" test to determine whether an activity constitutes a trade or business for purposes of the unrelated business income tax. See *Professional Insurance Agents of Michigan* v. *Commissioner*, 726 F. 2d 1097 (CA6 1984); *Carolinas Farm & Power Equipment Dealers* v. *United States*, 699 F. 2d 167 (CA4 1983); *Louisiana Credit Union League* v. *United States*, 693 F. 2d 525 (CA5 1982).

The Claims Court rested its conclusion on four factors. First, it found that "the program was devised as a means for fundraising and has been so presented and perceived from its inception." 4 Cl. Ct., at 409. Second, the court found that the program's phenomenal success in generating dividends for ABE was evidence of noncommercial behavior. The court noted that ABE's insurance program has provided $81.9 million in dividends in its 28 years of operation, and concluded that such large profits could not be the result of commercial success, but must proceed from the generosity of ABE's members. Third, and most important, in the court's view, was the fact that ABE's members collectively had the power to change ABE's conduct of the insurance program so as to drastically reduce premiums. That the members had not done so was strong evidence that they sought to further ABE's charitable purposes by paying higher insurance rates than necessary. Fourth, because ABE did not underwrite insurance or act as a broker, it was not competing with other commercial entities.

It appears, then, that the Claims Court viewed ABE as engaging in two separate activities—the provision of insurance and the acceptance of contributions in the form of dividends. If so, the unspoken premise of the Claims Court's decision is that ABE's income is not a result of the first activity, but of the second. There is some sense to this reasoning; should ABE sell a product to its members for more than that product's fair market value, it could argue to the IRS that the members intended to pay excessive prices as a form of contribution, and that some formula should be adopted to separate the income received into taxable profits and nontaxable contributions. Even if we viewed it as appropriate for the federal courts to engage in such a quasi-legislative activity, however, there is no factual basis for the Claims Court's attempt to do so in this case.

B

We cannot agree with the Claims Court that the enormous dividends generated by ABE's insurance program demonstrate that those dividends cannot constitute "profits." Were ABE's insurance markedly more expensive than other insurance products available to its members, but ABE nevertheless kept the patronage of those members, we might plausibly conclude that generosity was the reason for the program's success. The Claims Court did not find, however, that this was the case. ABE prices its insurance to remain competitive with the rest of the market. *Id.*, at 406. Thus ABE's members never squarely face the decision whether to support ABE or to reduce their own insurance costs.

The Claims Court concluded that "such profit margins [as ABE's] cannot be maintained year after year in a competitive market." *Id.*, at 410. The court apparently reasoned that ABE's staggering success would inevitably induce other firms to offer similar programs to ABA members unless that success is the result of charitable intentions rather than price-sensitive purchasing decisions. It is possible, of course, that ABE's members genuinely intend to support ABE by paying higher premiums than necessary, and would pay those high premiums even if a competing group insurance plan offered very low premiums. But that is by no means the only possible explanation for the market's failure to provide competition for ABE.[2] Lacking a factual basis for concluding that generosity is at the core of ABE's success, we can easily view this case as a standard example of monopoly pricing. ABE has a unique asset—its access to the ABA's members and their highly favorable mortality and morbidity rates—and it has chosen to appropriate for itself all of the profit possible from that asset, rather than sharing any with its members.

The argument that ABE's members could change the insurance program and receive the bulk of the dividends themselves if they so desired is unconvincing. Were ABE to give each member a choice between retaining his pro rata share of dividends or assigning them to ABE, the organization would have a strong argument that those dividends constituted a voluntary donation. That, however, is not the case here. ABE requires its members to assign it all dividends as a condition for participating in the insurance program. It is simply incorrect to characterize the assignment of dividends by each member as "voluntary" simply because the members theoretically could band together and attempt to change the policy.

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[2] One obvious consideration is that ABE's tax-exempt status would make it difficult for private firms to compete, see *infra*, at 114–115. In addition, as the Claims Court recognized, 4 Cl. Ct. 404, 414 (1984), the provision of group insurance coverage to a particular group may have the characteristics of a natural monopoly. The potential savings in insurance costs might decrease rapidly as the group splits into competing components. Finally, if the cost of assembling information about a particular group and maintaining an accurate list of members is high, the provision of group insurance might be economically feasible only if that cost can be shared among a variety of services performed by the group policyholder. In that case preexisting groups like the ABA or a trade association would obviously have a considerable advantage over new entrants. The record here is barren of facts concerning these hypotheses, and we express no opinion as to their accuracy. We present them, however, to demonstrate that it is incorrect to assume, as did the courts below, that ABE's profitability must result from the generosity of its members.

Again, the Claims Court put too much weight on an unsupported assumption. It found that the program was "operated with the approval and consent of the ABA membership," *ibid.*, observing that the program had met with "surprisingly little dissent," *id.*, at 411, even though there were "ample" opportunities for members to change policies with which they disagreed, *ibid.* We believe that those facts cannot carry the weight that the Claims Court put on them. Perhaps each member that purchases insurance would, given the option, pay excessive premiums in order to support ABE's charitable purposes; however, that is not the only possible explanation for the members' failure to change the program. Any given member might feel that the potential savings in insurance costs are not sufficient to justify the effort required to mount a challenge to ABE's leadership. Many might not want to "make waves" and upset a program that generates tax-free income for ABE and charitable deductions for their fellow members. The members' theoretical ability to change the program, therefore, is at best inconclusive.

The Claims Court also erred in concluding that ABE's insurance program did not present the potential for unfair competition. The undisputed purpose of the unrelated business income tax was to prevent tax-exempt organizations from competing unfairly with businesses whose earnings were taxed. H. R. Rep. No. 2319, 81st Cong., 2d Sess., 36 (1950); see *United States* v. *American College of Physicians*, 475 U. S., at 838. This case presents an example of precisely the sort of unfair competition that Congress intended to prevent. If ABE's members may deduct part of their premium payments as a charitable contribution, the effective cost of ABE's insurance will be lower than the cost of competing policies that do not offer tax benefits. Similarly, if ABE may escape taxes on its earnings, it need not be as profitable as its commercial counterparts in order to receive the same return on its investment. Should a commercial company attempt to displace ABE as the group policyholder, therefore, it would be at a decided disadvantage.

The Claims Court failed to find any taxable entities that compete with ABE, and therefore found no danger of unfair competition. It is likely, however, that many of ABE's members belong to other organizations that offer group insurance policies. Employers, trade associations,[3] and financial services companies frequently offer group insurance policies. Presumably those entities are taxed on their profits, and their policyholders may not deduct any part of the premiums paid. Such entities may therefore find it difficult to compete for the business of any ABE members who are otherwise eligible to participate in these group insurance programs.

The only valid argument in ABE's favor, therefore, is that the insurance program is billed as a fundraising effort. That fact, standing alone, cannot be determinative, or any exempt organization could engage in a tax-free business by "giving away" its product in return for a "contribution" equal to the market value of the product. ABE further contends that it must prevail because the Claims Court found that ABE's profits represent contributions rather than business income; ABE argues that we may not upset that finding unless it is clearly erroneous. Cf. *Carter* v. *Commissioner*, 645 F. 2d 784, 786 (CA9 1981) (question of profit motive for purposes of § 162 is one of fact). The undisputed facts, however, simply will not support the inference that the dividends ABE receives are charitable contributions from its members rather than profits from its insurance program. Moreover, the Claims Court failed to articulate a legal rule that would permit it to split ABE's activities into the gratuitous provision of a service and the acceptance of voluntary contributions, and we find no such rule in the Code or regulations. Even if we assumed, however, that the court's failure to attach the label "trade or business" to ABE's insurance program constitutes a finding of fact, we would be constrained to hold that finding clearly erroneous.

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[3] The unrelated business income cases cited in n. 1, *supra*, all concerned group insurance programs offered by trade associations to their members. In each case the Court of Appeals held that those programs constituted a taxable trade or business. The Claims Court distinguished those cases on the grounds that they involved organizations exempt as business leagues under § 501(c)(6) rather than as charities under § 501(c)(3). That distinction, however, is insubstantial. Business leagues engage in fundraising for exempt purposes just as charities do. The taxpayers in those cases could have claimed that the excess dividends constituted tax-exempt membership fees, just as ABE claims that they constitute tax-exempt charitable contributions. Both claims fail for the same reasons.

III

Section 170 of the Code provides that a taxpayer may deduct from taxable income any "charitable contribution," defined as "a contribution or gift to or for the use of" qualifying entities, § 170(c). The individual respondents contend that the excess of their premium payments over the cost to ABE of providing insurance constitutes a contribution or gift to ABE.

Many of the considerations supporting our holding that ABE's earnings from the insurance program are taxable also bear on the question whether ABE's members may deduct part of their premium payments. The evidence demonstrates, and the Claims Court found, that ABE's insurance is no more costly to its members than other policies—group or individual—available to them. Thus, as we have recognized, ABE's members are never faced with the hard choice of supporting a worthwhile charitable endeavor or reducing their own insurance costs.

A payment of money generally cannot constitute a charitable contribution if the contributor expects a substantial benefit in return. S. Rep. No. 1622, 83d Cong., 2d Sess., 196 (1954); *Singer Co.* v. *United States*, 196 Ct. Cl. 90, 449 F. 2d 413 (1971). However, as the Claims Court recognized, a taxpayer may sometimes receive only a nominal benefit in return for his contribution. Where the size of the payment is clearly out of proportion to the benefit received, it would not serve the purposes of § 170 to deny a deduction altogether. A taxpayer may therefore claim a deduction for the difference between a payment to a charitable organization and the market value of the benefit received in return, on the theory that the payment has the "dual character" of a purchase and a contribution. See, *e. g.*, Rev. Rul. 67-246, 1967-2 Cum. Bull. 104 (price of ticket to charity ball deductible to extent it exceeds market value of admission); Rev. Rul. 68-432, 1968-2 Cum. Bull. 104, 105 (noting possibility that payment to charitable organization may have "dual character").

In Rev. Rul. 67-246, *supra*, the IRS set up a two-part test for determining when part of a "dual payment" is deductible. First, the payment is deductible only if and to the extent it exceeds the market value of the benefit received. Second, the excess payment must be "made with the intention of making a gift." 1967-2 Cum. Bull., at 105. The Tax Court has adopted this test, see *Murphy* v. *Commissioner*, 54 T. C. 249, 254 (1970); *Arceneaux* v. *Commissioner*, 36 TCM 1461, 1464 (1977); but see *Oppewal* v. *Commissioner*, 468 F. 2d 1000, 1002 (CA1 1972) (expressing "dissatisfaction with such subjective tests as the taxpayer's motives in making a purported charitable contribution" and relying solely on differential between amount of payment and value of benefit).

The Claims Court applied that test in this case, and held that respondents Broadfoot, Boynton, and Turner had not established that they could have purchased comparable insurance for less money. Therefore, the court held, they had failed to establish that the value of ABE's insurance to them was less than the premiums paid. 4 Cl. Ct., at 415-417. Respondent Sherwood demonstrated that there did exist a group insurance program for which he was eligible and which offered lower premiums than ABE's insurance. However, Sherwood failed to establish that he was aware of that competing program during the years at issue. Sherwood therefore had failed to demonstrate that he met the second part of the above test—that he had intentionally paid more than the market value for ABE's insurance because he wished to make a gift.

The Court of Appeals, in reversing, held that the Claims Court had focused excessively on the taxpayers' motivation. In the Court of Appeals' view, the necessary inquiry was whether "the transaction was . . . of a business and not a charitable nature," considering all of the circumstances. 761 F. 2d, at 1582. The Court of Appeals therefore remanded for redetermination under that standard.

We hold that the Claims Court applied the proper standard. The *sine qua non* of a charitable contribution is a transfer of money or property without adequate consideration. The taxpayer, therefore, must at a minimum demonstrate that he purposely contributed money or property in excess of the value of any benefit he received in return. The most logical test of the value of the insurance respondents received is the cost of similar policies. Three of the four individual respondents failed to demonstrate that they could have purchased similar policies for a lower cost, and we must therefore assume that the value of ABE's insurance to those taxpayers at least equals their premium payments. Had respondent Sherwood known that he could purchase comparable insurance for less money, ABE's insurance would necessarily have declined in value to him. Because Sherwood did not have that knowledge, however, we again must assume that he valued ABE's insurance equivalently to those competing policies of which he was aware. Because those policies cost as much as or more than ABE's, Sherwood has failed to demonstrate that he intentionally gave away more than he received.

IV

We hold that ABE's insurance program is a "trade or business" for purposes of the unrelated business income tax. We further hold that the individual taxpayers have not established that any portion of their premium payments to ABE constitutes a charitable contribution. Accordingly, we reverse the judgment of the Court of Appeals and remand to that court with instructions to reverse the judgment of the Claims Court with respect to ABE and to affirm the judgment of the Claims Court with respect to the individual taxpayers.

It is so ordered.

JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this case.

JUSTICE STEVENS, dissenting.

The charitable work of the American Bar Endowment is funded, in large part, through a procedure in which the Endowment provides insurance policies for participating American Bar Association members, and the members assign the dividends to the ABE. The primary question presented is whether that assignment of dividends is taxable as an unrelated "trade or business."

"The problem at which the tax on unrelated business income is directed . . . is primarily that of unfair competition."[1] The unrelated business tax was adopted in 1950, and substantially revised in 1969. It is useful to recall the kind of situation that gave rise to the unrelated business tax. Perhaps the best known case involved the C. F. Mueller Company. The Mueller Company was a longstanding macaroni concern. It was acquired and operated for the benefit of the New York University School of Law, and its profits were donated to the University. The Internal Revenue Service claimed that the macaroni company's profits should be taxable, like any other competitive macaroni company, to avoid giving this competitor an unfair advantage. Although longstanding precedent seemed to be against the Commissioner, the Tax Court was sufficiently concerned about the implications that it agreed with the Commissioner. Ultimately, the Court of Appeals reversed, relying on precedent; by that time, however, Congress had acted and imposed a tax on unrelated business income. See *C. F. Mueller Co.* v. *Commissioner*, 190 F. 2d 120 (CA3 1951).

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[1] H. R. Rep. No. 2319, 81st Cong., 2d Sess., 36 (1950). See also *United States* v. *American College of Physicians*, 475 U. S. 834, 838 (1986) ("Congress perceived a need to restrain the unfair competition fostered by the tax laws"); *ante*, at 114 ("The undisputed purpose of the unrelated business income tax was to prevent tax-exempt organizations from competing unfairly with businesses whose earnings were taxed"); Treas. Reg. § 1.513–1(b), 26 CFR § 1.513–1(b) (1985) (Congress enacted the unrelated business tax "to eliminate a source of unfair competition by placing the unrelated business activities of certain exempt organizations upon the same tax basis as the nonexempt business endeavors with which they compete").

In considering the ABE insurance fundraising, then, it is appropriate to assume that, if the ABE were funded by operating a normal macaroni company and receiving an unfair competitive advantage from its tax exemption, it would be a "trade or business" within the Act and taxable. On the other hand, it is equally clear that, if the ABE simply provided insurance for ABA members at very low cost, and sent the insurance dividends with an urgent request that the dividends be assigned to the Endowment, the arrangement would not be a "trade or business," and would not be taxable.[2] The central issue in this case is thus whether the ABE's insurance program should be viewed as akin to the macaroni company, and thus a "trade or business," or as akin to the dividend assignment request, and thus not a "trade or business."

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[2] See Tr. of Oral Arg. 16 (Solicitor General's argument) ("If the Endowment were to refund the dividends to the members and the members were then voluntarily and individually to donate the money back to the Endowment, it is clear, and the IRS has agreed that the members would then be entitled to a charitable contribution deduction and that that money would come into the hands of the Endowment as charitable receipts, not as business income"). See also Brief for United States 24–25 ("If the Endowment had instead consented to rebate the dividends to its members, coupling such rebates with a request that the members voluntarily contribute the dividends back to it, it would have a strong claim that funds thus contrib-

I believe that the ABE's activities are far closer to the latter than the former for two reasons. First, there is no danger of unfair competition, the problem that the unrelated business tax addresses. Second, the program has functioned as a charitable fundraising effort, rather than as a business.

I

An understanding of the purpose of the unrelated business income tax exposes a basic error in the Court's analysis. As noted, that purpose is to protect commercial enterprises from the unfair competition that may be generated by the operation of competing businesses by tax-free organizations. There is no evidence in the record, despite more than three weeks of trial and numerous witnesses, to support the notion that the Endowment's provision of insurance to its members has had any competitive impact whatsoever. The Court relies on a parade of hypotheticals to justify its conclusion that there is some effect on competition.[3] The Court is, however, unable to point to a single piece of evidence in the

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uted were derived 'from' charitable solicitations rather than 'from' its insurance business"); *id.*, at 37 ("Had the Endowment requested its members individually to return their dividends as an act of generosity, it would have dealt with them as a charity"); *ante*, at 113 ("Were ABE to give each member a choice between retaining his pro rata share of dividends or assigning them to ABE, the organization would have a strong argument that those dividends constituted a voluntary donation").

[3] See *ante*, at 115 ("It *is likely* . . . that many of ABE's members belong to other organizations that offer group insurance policies"); *ibid.* ("Employers, trade associations, and financial services companies *frequently* offer group insurance policies"); *ibid.* ("*Presumably* those entities are taxed on their profits"); *ibid.* ("Such entities *may* therefore find it difficult to compete for the business of any ABE members who are otherwise eligible to participate in these group insurance programs") (emphases added).

record to justify its conclusion about the effect on competition. "Speculation about hypothetical cases illuminates the discussion in a classroom, but it is evidence and historical fact that provide the most illumination in a courtroom." *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. 573, 586 (1986) (STEVENS, J., dissenting). The trial judge scoured the record for evidence pointing to a harmful effect on competition, and found none.[4] The ab-

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[4] In its oral opinion at the end of trial, the Claims Court emphasized the absence of a "Ronzoni"—the macaroni-selling competitor who had been harmed by New York University's tax-free entry into the business:

"The unrelated business income tax was passed to avoid a certain kind of evil. . . . So you go back and look at what evil there is in the market. What was Congress trying to do . . . when the . . . tax was passed, and one comes to the frequently-asked question, 'Who is Ronzoni.'

"Now, nobody has really satisfactorily pointed to Ronzoni for me. I have been listening for three weeks of trial and nobody came up and said, 'Here, this is Ronzoni, this is the competitor that will be adversely affected in the manner in which Congress feared there would be adverse effects when it slapped Mueller Macaroni Company on the wrist, or basically said you cannot do that, you cannot use your . . . tax exempt status to make profits.[']

"And I am still somewhat nebulous as to who Ronzoni is, as to who is hurt, who is damaged if members of the association on the one hand allow the association to use its group asset in order to raise funds.

. . . . .

"And . . . perhaps other witnesses and other economists, on a different record, somebody will be able to point out to me Ronzoni in this . . . picture, but I have tried very hard, and looking at the policies of the tax, the policies of the unrelated business income tax, I have not been able to find the evils that Congress sought to alleviate by passing that tax." App. 507–509.

In the published opinion, the Claims Court incorporated its earlier oral opinion, 4 Cl. Ct. 404, 405, n. 1 (1984), and reiterated that the record did not support a finding of a harmful effect on competition:

"The absence of any identifiable business over which the ABE is able to gain an unfair advantage supports the conclusion that its activities are not commercial and therefore not a business. At the very least, it suggests that nothing in the policies underlying the [unrelated business tax] requires that the Endowment's activities be taxed. Indeed, it appears that sence of evidence in the record, rather than the Court's ruminations about possibilities and likelihoods, should control our analysis.

The legislative history further underscores the fact that the ABE insurance operation poses none of the possible effects on competition that the unrelated business tax was intended to address. Congress has twice made clear that insurance programs by other nonprofit organizations are not subject to the unrelated business tax. When Congress substantially revised the unrelated business tax in 1969, the accompanying legislative history emphasized that the group insurance policies provided by fraternal organizations were not intended to be subject to the unrelated business tax.[5] Similarly, when a question arose concerning the taxability of income from insurance programs administered by veterans' organizations, Congress enacted legislation to ensure that the insurance income would not be taxed.[6] Indeed, Con-

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the Endowment's activities have an entirely procompetitive effect, fully consistent with the policies of the [unrelated business tax]. The congressional purpose behind the statute would therefore not be served by holding that the Endowment was engaging in a business activity by operating the insurance program." *Id.*, at 414.

[5] See H. R. Rep. No. 91-413, p. 47 (1969) ("In extending the unrelated business income tax to virtually all exempt organizations . . . the bill continues to exclude from 'unrelated business income,' earnings from business related to an organization's exempt function—such as an insurance business run by a fraternal beneficial association for its members"); S. Rep. No. 91-552, p. 68 (1969) ("[I]f the fraternal beneficiary society directly provides insurance for its members and their dependents, or arranges with an insurance company to make group insurance available to them, the amounts received by the society from its members for providing, or from the insurance company for arranging, for this exempt function will continue to be excluded from the unrelated business income tax").

[6] See S. Rep. No. 92-1082, pp. 2-3 (1972) (The "1969 Act extended the application of the unrelated business income tax to virtually all exempt organizations, including social welfare organizations and social clubs. . . . As a result, questions have been raised as to whether the income derived by veterans' organizations from their insurance activities is now subject to the unrelated business income tax. . . . [I]t was made clear in a 1969 Act

gress found the taxation of the veterans' insurance operations so contrary to its intent that it took the unusual step of making the 1972 amendment fully retroactive to 1969.[7]

The Government argues that these developments actually support its position because the need for congressional attention, and the emphasis on the "substantially related" prong for the fraternal societies, reveal that, without such attention, and without such a substantial relationship, the activity should be presumptively taxable. Particularly when the general legislative purpose of preventing unfair competition is considered, however, these legislative developments have a different significance. For they highlight the fact that the "market" in which the ABE is competing, even temporarily leaving aside the complete absence of evidence of harm to competitors, is itself already partially exempt from the unrelated business income tax provisions, and the possible threat to competition becomes all the more hypothetical and remote.

Ironically, moreover, the tax-exempt alternative suggested by the Government would have a far more obvious effect on competition than the ABE's current fundraising process. For the ABE would then be offering insurance rates dramatically lower than those available elsewhere. If speculation of the kind indulged in by the majority is appropriate, that speculation surely should include the realization that the tax-exempt alternative—in which the ABE would merely recover its actual costs of managing the program and return all of the premium refunds to the individual policyholders—would attract more than the 20% of the ABA membership

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committee report that income from insurance activities of fraternal beneficiary associations would be exempt from the unrelated business income tax. The committee agrees with the House that there was no reason not to provide similar treatment for exempt veterans' organizations").

[7] See *id.*, at 3 ("Since the committee believes that there was no specific intent to tax the insurance income of veterans' organizations by the 1969 Act, it, therefore, believes it is appropriate to make the exemption of their insurance income from the unrelated business income tax effective as of the effective date of the Tax Reform Act").

that currently hold ABE policies; it would appeal to those who simply want an insurance bargain rather than those who also want to make a charitable contribution.[8]

It is not completely surprising that a consideration of the purpose of the unrelated business tax in light of the record developed at the extensive trial leads to a conclusion that the ABE's program should not be taxed. For the Government itself initially held such a view.[9] Furthermore, the ABE's insurance program was initiated in 1955 as a pioneering, and widely publicized, effort in charitable fundraising. When Congress revamped the unrelated business tax in 1969, there was no suggestion that it was intended to apply to this venerable and successful program, and the IRS did not so interpret it until several years later.

In short, a proper consideration of the purpose of the unrelated business tax leads to a conclusion that the ABE's insurance program is not a "trade or business."[10]

II

Not only does the ABE program completely fail to raise the concerns against which the unrelated business tax is directed, but it is also operated as a charitable fundraising endeavor.

The learned trial judge expressly found, after hearing a good deal of evidence, that the assignment of the dividends was the result of charitable intentions, rather than a commercial transaction. First, he found that, since the program's inception, for three decades, the ABE has trumpeted the insurance program as a charitable fundraising activity, and that it has been so understood.[11] The trial court emphasized that even members who testified against the ABE viewed the insurance program as strictly a charitable fundraising effort.[12] Second, the court specifically found that the reason for the Endowment's enormous profits was the charitable intent of the members.[13] Finally, the court emphasized that, all of the factors of the program, taken together, compel the conclusion that the ABE procedure was operated as, and understood to be, charitable fundraising rather than a business.[14]

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[8] Cf. 4 Cl. Ct., at 414 ("Had the program been operated entirely as a service, offering the lowest possible rates, many more members would have joined the program and there would have been greater concentration of business in the two insurance carriers").

[9] See I. R. S. Letter Ruling 8042012 (July 3, 1980) (citing technical advice memorandum of January 31, 1973, which concluded that ABE's insurance program was not a business); 4 Record 854. See also 4 Cl. Ct., at 414.

[10] Cf. *Hope School* v. *United States*, 612 F. 2d 298, 304 (CA7 1980) (Sprecher, J.) ("unfair competition is the key to whether the activities of the Hope School constitute an unrelated trade or business as a matter of law").

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[11] See 4 Cl. Ct., at 409 ("Advertising and other promotional materials consistently referred to the use of dividends for the Endowment's charitable endeavors; the Endowment's annual reports discussed the insurance program as a source of charitable contributions; communications to policyholders consistently referred to the Endowment's retention of dividends as donations, not as profits. In short, both the ABE leadership and the insured members considered the insurance program a fundraising activity and treated it as such").

[12] See *id.*, at 409, n. 5 ("Even those ABE members who testified for the defendant appeared to share this view. While these witnesses disagreed with the manner in which the program was operated and would have preferred to pay lower premiums by terminating the program's fundraising function, they certainly never suggested that the Endowment was operating a business which was profiting at their expense").

[13] See *id.*, at 411–412 ("The amount of money ABE is permitted to retain far exceeds the value of any service it may be providing through the operation of the insurance programs. It is quite obvious, then, that this money was not earned 'from the sale of goods or the performance of services,' 26 U. S. C. § 513 (c) (1976), but for some other reason. That reason was the intent of the members to support the Endowment's charitable activities").

[14] The trial judge found:

"When taken together, these factors make it impossible to conclude that the insurance programs were operated by ABE in a competitive, commercial manner. The Endowment raised huge sums of money by its activities, sums wholly unrelated to the value of any service it provided and which

Notwithstanding the Court of Appeals' explicit endorsement of the trial judge's findings,[15] this Court speculates that the members' assignment of their premium refunds was not "voluntary" because the assignment was a condition to participating in the insurance program.[16] This speculation rests on a remarkably unrealistic appraisal of the intelligence and independence of the lawyers who participate in the ABE program. Those who elected to buy the insurance and contribute the premium refunds to the Endowment clearly understood the legal consequences of the transaction, and were free to purchase insurance elsewhere if they did not want to make the requested charitable contribution.[17]

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dwarfed the profit margins of insurance-related businesses. It disclosed the relevant facts to its members at every available opportunity, yet the members (who bore the economic cost of this program) allowed the practice to continue although they collectively had the power to change it. No business could operate in this fashion. . . . One would have to assume that ABA/ABE members have been subject to an epidemic of irrationality in permitting themselves to be bilked in this manner for almost three decades. The far more reasonable explanation is that the members are entirely rational and are permitting the ABE to collect such substantial revenues at their expense because they consider the Endowment to be engaged in fundraising, which they support. By any standard, an enterprise that depends on the consent of its customers for its profits is not operating in a commercial manner and is not a trade or business." *Id.*, at 411.

[15] "In this connection the Claims Court specifically and permissibly rejected the Government's contention that the dividends represent a payment for the Endowment's services. Because the Endowment's accumulation of funds was not the result of a commercial exchange, we agree with the Claims Court's view that the dividends do not constitute 'profits' which fall within the definition of section 513(c)." 761 F. 2d 1573, 1578 (CAFC 1985) (footnote omitted).

[16] See *ante*, at 113 ("It is simply incorrect to characterize the assignment of dividends by each member as 'voluntary' simply because the members theoretically could band together and attempt to change the policy").

[17] The Court's description of the insurance program is also somewhat misleading. For example, it states that "the after-tax cost of ABE's insurance to its members is less than the cost of a commercial policy with identical coverage and premium rates." *Ante*, at 108. This statement assumes, contrary to the Court's holding, that the assignment of the member's pre-

The Court's opinion also seems to rest on the notion that the ABE members who purchased insurance were somehow coerced by a monopolist.[18] But this is absurd. There is nothing in the record to suggest that the insurance policy offered by the ABE to its members was so attractive that the ABE could foist some unwanted condition upon its members. After all, only 20% of the membership purchased the policies. This transaction has none of the earmarks of an improper tying arrangement.[19]

Finally, the Court states that "there is no factual basis" for an assumption that the large revenues generated by the insurance program were the result of the members' charitable motivation rather than the market value of the insurance package, see *ante*, at 112–113. But this is what the Claims Court found:

> "I am persuaded that if the American Bar Association Plan were not viewed as a fundraising enterprise and were not viewed by the overwhelming majority of the membership as something to be tolerated as, to be sure,

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mium refund is a tax-deductible contribution by the member to the ABE. Even on this assumption, however, the statement is inaccurate. Assume an ABE annual premium of $100, a refund of $40, and a 50% tax bracket for the member: After-tax cost is then $80. Identical coverage and premium rates for a non-ABE member (with the $40 refund retained by the policyholder) would produce a net cost of only $60. Only if one assumes "identical coverage and premium rates" but a $40 refund in the ABE case and no refund in the non-ABE case would the Court's statement be accurate. But then the disparity would be attributable to the differing refunds, not to the deductibility of the contribution. The Court seems to assume that a tax deduction is more valuable than cash. No wonder it is unable to recognize the charitable character of the assignments described in this record.

[18] Cf. *ante*, at 113 (suggesting that case presents "a standard example of monopoly pricing").

[19] Nor does the ABA represent the kind of coerced membership situation that raises constitutional concerns and a need for judicial solicitude for a member who disagrees with the organization. Cf. *Teachers* v. *Hudson*, 475 U. S. 292 (1986) (First Amendment rights of nonunion worker when union seeks agency fee as the exclusive bargaining representative).

> an economic expense but one for the good of the profession, and for the greater good of society, that it would not exist, it could not have existed, it could not have survived, it would not have survived to today. And at least on the basis of this record those are my findings on that point." App. 505.

See also 4 Cl. Ct. 404, 405, n. 1 (1984) (incorporating oral findings of fact).

I believe that we are bound by that finding. The Court's suggestion to the contrary notwithstanding,[20] rejecting that finding would run afoul of the "two court rule,"[21] would decide the case on a ground expressly disavowed by the Government, and would conflict with the record. That finding, combined with the other findings and with a proper analysis of the purpose and scope of the unrelated business tax, requires a conclusion that the ABE has been operated as a charitable fundraising effort, rather than as a commercial business.

III

The ABE's program poses no harm to competitors and has been operated as a charitable fundraising activity. Depending on its members' agreement to assign their dividends, it is far less like the operation of a competitive macaroni company than like the provision of insurance as a service with a request for the dividends. In my opinion, the Court of Appeals and the Chief Judge of the Claims Court were both quite correct in concluding that, on the basis of the record generated at the vigorously contested trial, the tax that the Government seeks to collect in this case was not the kind of tax that Congress intended to impose.[32] Accordingly, I respectfully dissent.

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[20] See also *ante*, at 116 ("Even if we assumed . . . that the court's failure to attach the label 'trade or business' to ABE's insurance program constitutes a finding of fact, we would be constrained to hold that finding clearly erroneous").

[21] See *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error").

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[32] In my opinion, moreover, the charitable character of the dividend assignment requires that the assignment be deductible for the individuals at the time the policy is purchased or renewed just as it would, in the Government's example, at the time the dividend was received and assigned.

MAINE *v.* TAYLOR ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 85-62. Argued March 24, 1986—Decided June 23, 1986

Appellee bait dealer (appellee) arranged to have live baitfish imported into Maine, despite a Maine statute prohibiting such importation. He was indicted under a federal statute making it a federal crime to transport fish in interstate commerce in violation of state law. He moved to dismiss the indictment on the ground that the Maine statute unconstitutionally burdened interstate commerce, and Maine intervened to defend the validity of its statute. After an evidentiary hearing, the District Court denied the motion to dismiss and held the state statute constitutional. The court found that substantial uncertainties surrounded the effects that baitfish parasites and nonnative species would have on the State's wild fish population, and that less discriminatory means of protecting against those threats were currently unavailable. Appellee then entered a conditional guilty plea, reserving the right to appeal the District Court's constitutional ruling. The Court of Appeals reversed, concluding that the state statute was unconstitutional.

Held:

1. Maine is entitled to invoke this Court's jurisdiction under 28 U. S. C. § 1254(2). Nothing in the language or history of § 1254(2) suggests that its scope is limited to civil litigation. The fact that Maine was only an intervenor in the District Court does not deprive it of standing to pursue this appeal, because its stake in the outcome is substantial and the controversy remains live, notwithstanding the Federal Government's decision to abandon its own appeal. Pp. 133-137.

2. The Maine statute is constitutional. The federal statute under which appellee was convicted did not waive the requirement of *Hughes* v. *Oklahoma*, 441 U. S. 322, that where a state statute, such as Maine's import ban, discriminates against interstate commerce either on its face or in practical effect, the State must show both that the statute serves a legitimate local purpose, and that this purpose cannot be served as well by available nondiscriminatory means. But the evidence amply supports the District Court's findings that Maine has made both showings. Under the "clearly erroneous" standard of review applicable to these findings, the Court of Appeals erred in setting them aside. Pp. 137-152.

752 F. 2d 757, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 152.

Cabanne Howard, Deputy Attorney General of Maine, argued the cause for appellant. With him on the briefs was *James E. Tierney*, Attorney General.

Jerrold J. Ganzfried argued the cause for the United States, as appellee under this Court's Rule 10.4, in support of appellant. With him on the brief were *Solicitor General Fried, Assistant Attorney General Habicht, Deputy Solicitor General Wallace, Donald A. Carr, Dirk D. Snel*, and *Margaret A. Hill.*

E. Paul Eggert argued the cause for appellee Taylor. With him on the brief was *Robert Edmond Mittel.*

JUSTICE BLACKMUN delivered the opinion of the Court.

Once again, a little fish has caused a commotion. See *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979); *TVA* v. *Hill*, 437 U. S. 153 (1978); *Cappaert* v. *United States*, 426 U. S. 128 (1976). The fish in this case is the golden shiner, a species of minnow commonly used as live bait in sport fishing.

Appellee Robert J. Taylor (hereafter Taylor or appellee) operates a bait business in Maine. Despite a Maine statute prohibiting the importation of live baitfish,[1] he arranged to have 158,000 live golden shiners delivered to him from outside the State. The shipment was intercepted, and a federal grand jury in the District of Maine indicted Taylor for violating and conspiring to violate the Lacey Act Amendments of 1981, 95 Stat. 1073, 16 U. S. C. §§3371–3378. Section 3(a)(2)(A) of those Amendments, 16 U. S. C. §3372(a)(2)(A), makes it a federal crime "to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce . . . any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law."

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[1] "A person is guilty of importing live bait if he imports into this State any live fish, including smelts, which are commonly used for bait fishing in inland waters." Me. Rev. Stat. Ann., Tit. 12, §7613 (1981).

Taylor moved to dismiss the indictment on the ground that Maine's import ban unconstitutionally burdens interstate commerce and therefore may not form the basis for a federal prosecution under the Lacey Act. Maine, pursuant to 28 U. S. C. § 2403(b), intervened to defend the validity of its statute, arguing that the ban legitimately protects the State's fisheries from parasites and nonnative species that might be included in shipments of live baitfish. The District Court found the statute constitutional and denied the motion to dismiss. *United States* v. *Taylor*, 585 F. Supp. 393 (Me. 1984). Taylor then entered a conditional plea of guilty pursuant to Federal Rule of Criminal Procedure 11(a)(2), reserving the right to appeal the District Court's ruling on the constitutional question. The Court of Appeals for the First Circuit reversed, agreeing with Taylor that the underlying state statute impermissibly restricts interstate trade. *United States* v. *Taylor*, 752 F. 2d 757 (1985). Maine appealed. We set the case for plenary review and postponed consideration of Taylor's challenges to our appellate jurisdiction. 474 U. S. 943 (1985).

I

Maine invokes our jurisdiction under 28 U. S. C. § 1254(2), which authorizes an appeal as of right to this Court "by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States." Appellee, however, contends that this provision applies only to civil cases, and that, in any event, Maine lacks standing to appeal the reversal of a federal conviction. These contentions both relate to the unusual procedural posture of the case: an appeal by a State from the reversal of a federal conviction based on a violation of state law. We consider them in turn.

First, despite its procedural peculiarities, this case fits squarely within the plain terms of § 1254(2): Maine relies on a state statute that the Court of Appeals held to be unconstitutional. Although statutes authorizing appeals as of right to this Court are strictly construed, see, *e. g.*, *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 247 (1984), nothing in the language or legislative history of § 1254(2) suggests that its scope is limited to civil litigation. In arguing for such a limitation, appellee relies principally on the fact that §§ 1254(1) and (3)—which authorize discretionary review of cases from the Courts of Appeals by writ of certiorari and certification, respectively—both apply explicitly to "any civil or criminal case."[2] Since this express language is absent from § 1254(2), appellee contends that Congress must have intended this Court's appellate jurisdiction over cases from the courts of appeals to remain limited to civil cases, as indeed it was limited prior to the 1925 enactment of § 1254's predecessor.[3]

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[2] Section 1254 reads in full:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

"(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

"(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy."

[3] Congress in 1925 amended § 240(b) of the Judicial Code to read as follows:

"Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall

We find the argument unconvincing. While some statutes governing this Court's jurisdiction, such as §§ 1254(1) and (3), expressly apply to both civil and criminal cases, others are explicitly limited to civil actions. See, *e. g.*, 28 U. S. C. §§ 1252 and 1253. The absence of *either* sort of provision from § 1254(2) hardly demonstrates that Congress had only civil cases in mind, and we see no reason to read such a limitation into the straightforward and unambiguous terms of the statute. This is not a situation where "the sense of the statute and the literal language are at loggerheads," or where adherence to the plain terms of the statute "'would confer upon this Court a jurisdiction beyond what "naturally and properly belongs to it."'" *Heckler* v. *Edwards*, 465 U. S. 870, 879 (1984), quoting *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U. S. 73, 94 (1960) (Frankfurter, J., dissenting), in turn quoting *American Security & Trust Co.* v. *District of Columbia*, 224 U. S. 491, 495 (1912). Section 1254(2) serves to ensure that a state statute is struck down by the federal judiciary only when it is found invalid by this Court, or when the parties acquiesce in the decision of a lower federal court. Federal nullification of a state statute is a grave matter whether it occurs in civil litigation or in the course of a criminal prosecution, and review by this Court is particularly warranted in either event.[4]

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be restricted to an examination and decision of the Federal questions presented in the case." Act of Feb. 13, 1925, § 1, 43 Stat. 939.

Until then, appeals were allowed as of right from decisions of the courts of appeals only in civil cases involving more than $1,000, and not arising under the diversity, admiralty, patent, or revenue jurisdiction of the federal courts. See Act of Mar. 3, 1891, § 6, 26 Stat. 828.

The relevant portion of the 1925 Act was added on the floor of the Senate, and the debates surrounding the amendment contain no suggestion that it was intended to apply only in civil cases. See 66 Cong. Rec. 2753–2754, 2757, 2919–2925 (1925).

[4] Even if this case fell outside the scope of 28 U. S. C. § 1254(2), we would still have discretion under 28 U. S. C. § 2103 to grant review by writ

Appellee's second jurisdictional argument is based on the fact that the only appellant before this Court is the State of Maine—only an intervenor in the District Court—not the United States, which brought the original prosecution.[5] Since the United States and its attorneys have the sole power to prosecute criminal cases in the federal courts, appellee contends that Maine may not seek review of the Court of Appeals' reversal of his conviction. By statute, however, Maine intervened with "all the rights of a party," 28 U. S. C. § 2403(b),[6] and appeals may be taken to this Court under § 1254(2) by any "party relying on a State statute" held invalid under federal law by a Court of Appeals. We previously have recognized that intervenors in lower federal courts may seek review in this Court on their own, so long as they have "a sufficient stake in the outcome of the controversy" to satisfy the constitutional requirement of genuine adversity. *Bryant* v. *Yellen*, 447 U. S. 352, 368 (1980); see

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of certiorari. See *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 927 (1975); *El Paso* v. *Simmons*, 379 U. S. 497, 502–503 (1965).

[5] The United States filed a timely notice of appeal to this Court, App. 311, but later moved in the Court of Appeals to dismiss its appeal. *Id.*, at 313. This was "[b]ecause the Acting Solicitor General determined that other cases were entitled to priority in selecting the limited number of cases the government would ask this Court to review." Brief for United States 14–15. The Court of Appeals granted the Government's motion. App. 315.

[6] Title 28 U. S. C. § 2403(b) provides:

"In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality."

also, *e. g., Diamond* v. *Charles*, 476 U. S. 54, 68 (1986). Maine's stake in the outcome of this litigation is substantial: if the judgment of the Court of Appeals is left undisturbed, the State will be bound by the conclusive adjudication that its import ban is unconstitutional. See, *e. g., Stoll* v. *Gottlieb*, 305 U. S. 165 (1938). And although private parties, and perhaps even separate sovereigns, have no legally cognizable interest in the prosecutorial decisions of the Federal Government, cf., *e. g., Diamond* v. *Charles, supra,* at 64–65; *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 619 (1973), a State clearly has a legitimate interest in the continued enforceability of its own statutes, see *Diamond* v. *Charles, supra,* at 65; *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez,* 458 U. S. 592, 601 (1982). Furthermore, because reversal of the judgment of the Court of Appeals would result in the automatic reinstatement of appellee's guilty plea, the controversy before us clearly remains live notwithstanding the Federal Government's decision to abandon its own appeal.[7] We turn to the merits.

II

The Commerce Clause of the Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, §8, cl. 3. "Although the Clause thus speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade." *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 35 (1980). Maine's statute restricts interstate trade in the most direct manner possible, blocking all inward shipments of live baitfish at the State's border. Still, as both the District Court and the Court of

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[7] The United States advises us that it does not intend to seek dismissal of the indictment if Maine prevails in this Court. See Brief for United States 17, n. 17.

Appeals recognized, this fact alone does not render the law unconstitutional. The limitation imposed by the Commerce Clause on state regulatory power "is by no means absolute," and "the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." *Id.*, at 36.

In determining whether a State has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are "clearly excessive in relation to the putative local benefits," *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970), statutes in the second group are subject to more demanding scrutiny. The Court explained in *Hughes* v. *Oklahoma*, 441 U. S., at 336, that once a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means. See also, *e. g.*, *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U. S. 941, 957 (1982); *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333, 353 (1977); *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 354 (1951).

The District Court and the Court of Appeals both reasoned correctly that, since Maine's import ban discriminates on its face against interstate trade, it should be subject to the strict requirements of *Hughes* v. *Oklahoma*, notwithstanding Maine's argument that those requirements were waived by the Lacey Act Amendments of 1981. It is well established that Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid. See, *e. g.*, *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 769 (1945). But because of the important role the Commerce Clause plays in protecting the free flow of interstate trade, this Court has exempted state statutes from the implied limitations of the Clause only when the congressional direction to do so has been "unmistakably clear." *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U. S. 82, 91 (1984). The 1981 Amendments of the Lacey Act clearly provide for federal enforcement of valid state and foreign wildlife laws, but Maine identifies nothing in the text or legislative history of the Amendments that suggests Congress wished to validate state laws that would be unconstitutional without federal approval.

Before this Court, Maine concedes that the Lacey Act Amendments do not exempt state wildlife legislation from scrutiny under the Commerce Clause. See Reply Brief for Appellant 3, n. 2. The State insists, however, that the Amendments should lower the *intensity* of the scrutiny that would otherwise be applied. We do not agree. An unambiguous indication of congressional intent is required before a federal statute will be read to authorize otherwise invalid state legislation, regardless of whether the purported authorization takes the form of a flat exemption from Commerce Clause scrutiny or the less direct form of a reduction in the level of scrutiny. Absent "a clear expression of approval by Congress," any relaxation in the restrictions on state power otherwise imposed by the Commerce Clause unacceptably increases "the risk that unrepresented interests will be adversely affected by restraints on commerce." *South-Central Timber*, *supra*, at 92.

In this case, there simply is no unambiguous statement of any congressional intent whatsoever "to alter the limits of state power otherwise imposed by the Commerce Clause," *United States* v. *Public Utilities Comm'n of California*, 345 U. S. 295, 304 (1953). In arguing to the contrary, Maine relies almost exclusively on the following findings in the Senate Report on the Lacey Act Amendments:

> "It is desirable to extend protection to species of wildlife not now covered by the Lacey Act, and to plants which are presently not covered at all. States and foreign government are encouraged to protect a broad variety of species. Legal mechanisms should be supportive of those governments." S. Rep. No. 97-123, pp. 3-4 (1981).

Maine reads this passage, particularly the last sentence, to direct federal courts to treat state wildlife laws more leniently. We find this interpretation not only less than obvious but positively strained; by far the more natural reading of the last sentence is that it refers only to the availability of federal investigative and prosecutorial resources to enforce *valid* state wildlife laws. The passage certainly does not make "unmistakably clear" that Congress intended in 1981 to alter in any way the level of Commerce Clause scrutiny applied to those laws. Maine's ban on the importation of live baitfish thus is constitutional only if it satisfies the requirements ordinarily applied under *Hughes* v. *Oklahoma* to local regulation that discriminates against interstate trade: the statute must serve a legitimate local purpose, and the purpose must be one that cannot be served as well by available nondiscriminatory means.

III

The District Court found after an evidentiary hearing that both parts of the *Hughes* test were satisfied, but the Court of Appeals disagreed. We conclude that the Court of Appeals erred in setting aside the findings of the District Court. To explain why, we need to discuss the proceedings below in some detail.

A

The evidentiary hearing on which the District Court based its conclusions was one before a Magistrate. Three scientific experts testified for the prosecution and one for the defense. The prosecution experts testified that live baitfish imported into the State posed two significant threats to Maine's unique and fragile fisheries.[8] First, Maine's population of wild fish—including its own indigenous golden shiners—would be placed at risk by three types of parasites prevalent in out-of-state baitfish, but not common to wild fish in Maine. See, *e. g.*, App. 39–55.[9] Second, nonnative species inadvertently included in shipments of live baitfish could disturb Maine's aquatic ecology to an unpredictable extent by competing with native fish for food or habitat, by preying on native species, or by disrupting the environment in more subtle ways. See, *e. g.*, *id.*, at 59–70, 141–149.[10]

The prosecution experts further testified that there was no satisfactory way to inspect shipments of live baitfish for parasites or commingled species.[11] According to their testimony, the small size of baitfish and the large quantities in which they are shipped made inspection for commingled species "a physical impossibility." *Id.*, at 81.[12] Parasite inspection posed a separate set of difficulties because the examination procedure required destruction of the fish. *Id.*, at 81–82,

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[8] One prosecution witness testified that Maine's lakes contain unusually clean water and originally supported "a rather delicate community of just a few species of fish." App. 57. Another stressed that "no other state . . . has any real landlocked salmon fishing. You come to Maine for that or you live in Maine for that." *Id.*, at 137.

[9] Two of these types of parasites were found in appellee's confiscated shipment of golden shiners. See *United States* v. *Taylor*, 585 F. Supp. 393, 395–396 (Me. 1984).

[10] Although appellee's shipment was not found to contain any fish other than golden shiners, it did contain "some polliwogs and . . . some crustacean crawfish." App. 69. There was testimony suggesting that these could pose the same ecological risks as nonnative fish. See *id.*, at 70.

[11] The expert who examined appellee's shipment testified that, although his inspection of the shipment revealed only two of the three parasites he described as prevalent in baitfish outside Maine, "I certainly could not put my signature on a certificate to say that [none of the third parasite] was present in that lot." *Id.*, at 85.

[12] The shipment intercepted in this case contained approximately 158,000 fish, with about 70 specimens to the pound. *Id.*, at 80.

195. Although statistical sampling and inspection techniques had been developed for salmonids (*i. e.*, salmon and trout), so that a shipment could be certified parasite-free based on a standardized examination of only some of the fish, no scientifically accepted procedures of this sort were available for baitfish. See, *e. g.*, *id.*, at 71, 184, 193–194.[13]

Appellee's expert denied that any scientific justification supported Maine's total ban on the importation of baitfish. *Id.*, at 241. He testified that none of the three parasites discussed by the prosecution witnesses posed any significant threat to fish in the wild, *id.*, at 206–212, 228–232, and that sampling techniques had not been developed for baitfish precisely because there was no need for them. *Id.*, at 265–266. He further testified that professional baitfish farmers raise their fish in ponds that have been freshly drained to ensure that no other species is inadvertently collected. *Id.*, at 239–240.

Weighing all the testimony, the Magistrate concluded that both prongs of the *Hughes* test were satisfied, and accordingly that appellee's motion to dismiss the indictment should be denied. Appellee filed objections, but the District Court, after an independent review of the evidence, reached the same conclusions. First, the court found that Maine "clearly has a legitimate and substantial purpose in prohibiting the importation of live bait fish," because "substantial uncertainties" surrounded the effects that baitfish parasites would have on the State's unique population of wild fish, and the consequences of introducing nonnative species were similarly unpredictable. 585 F. Supp., at 397.[14] Second, the court concluded that less discriminatory means of protecting against these threats were currently unavailable, and that, in particular, testing procedures for baitfish parasites had not yet been devised. *Id.*, at 398. Even if procedures of this sort could be effective, the court found that their development probably would take a considerable amount of time. *Id.*, at 398, n. 11.[15]

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[13] According to the prosecution testimony, the design of sampling and inspection techniques must take into account the particular parasites of concern, and baitfish parasites differ from salmonid parasites. See, *e. g.*, *id.*, at 184, 193–194. Appellee's expert agreed. *Id.*, at 237, 265–267. There was also testimony that the physical layout of bait farms makes inspection at the source of shipment particularly difficult, and that border inspections are not feasible because the fish would die in the time it takes to complete the tests. *Id.*, at 75–79.

Although the Court of Appeals did not expressly set aside the District Court's finding of a legitimate local purpose, it noted that several factors "cast doubt" on that finding. 752 F. 2d, at 762. First, Maine was apparently the only State to bar all importation of live baitfish. See *id.*, at 761. Second, Maine accepted interstate shipments of other freshwater fish, subject to an inspection requirement. Third, "an aura of economic protectionism" surrounded statements made in 1981 by the Maine Department of Inland Fisheries and Wildlife in opposition to a proposal by appellee himself to repeal the ban. *Ibid.* Finally, the court noted that parasites and nonnative species could be transported into Maine in shipments of nonbaitfish, and that nothing prevented fish from simply swimming into the State from New Hampshire. *Id.*, at 762, n. 12.

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[14] For several reasons, the District Court discounted the testimony of appellee's expert that baitfish parasites did not pose so serious a threat as disease organisms found in salmonids. The court noted that "considerable scientific debate" surrounded even the threat posed by salmonid diseases, that appellee's expert testified largely about the effects that baitfish parasites had in commercial hatcheries rather than in the wild, and that he was unfamiliar with northeast fisheries. 585 F. Supp., at 397.

[15] While the District Court approved the Magistrate's general finding that "there are no obviously workable alternatives to the outright prohibition of importation," *id.*, at 398, neither the court nor the Magistrate made any specific finding as to whether Maine could adequately protect against the inadvertent introduction of nonnative species by allowing baitfish to be imported only from professional bait farmers using freshly drained ponds. There was conflicting evidence on this point. Appellee's expert suggested that such methods largely eliminated the problem of commingled species, App. 239–240, but a prosecution witness testified that complete success was "unlikely." *Id.*, at 170. See also *id.*, at 150 (prosecution testimony that shipments cannot be screened reliably for commingled species because "[t]his is a business. You have living material that you have to move; you can't hold them in tanks and this kind of thing for any length of time"). We are in no position to resolve this factual dispute, and we conclude in any event that the District Court's findings regarding parasites adequately support the constitutionality of the challenged statute.

Despite these indications of protectionist intent, the Court of Appeals rested its invalidation of Maine's import ban on a different basis, concluding that Maine had not demonstrated that any legitimate local purpose served by the ban could not be promoted equally well without discriminating so heavily against interstate commerce. Specifically, the court found it "difficult to reconcile" Maine's claim that it could not rely on sampling and inspection with the State's reliance on similar procedures in the case of other freshwater fish. *Id.*, at 762.[16]

Following the reversal of appellee's conviction, Maine and the United States petitioned for rehearing on the ground that the Court of Appeals had improperly disregarded the District Court's findings of fact. The court denied the petitions, concluding that, since the unavailability of a less discriminatory alternative "was a mixed finding of law and fact," a reviewing court "was free to examine carefully the factual record and to draw its own conclusions." *Id.*, at 765.

B

Although the proffered justification for any local discrimination against interstate commerce must be subjected to "the strictest scrutiny," *Hughes* v. *Oklahoma*, 441 U. S., at 337, the empirical component of that scrutiny, like any other form of factfinding, "'is the basic responsibility of district courts, rather than appellate courts,'" *Pullman-Standard* v. *Swint*, 456 U. S. 273, 291 (1982), quoting *DeMarco* v. *United States*, 415 U. S. 449, 450, n. (1974). As this Court frequently has emphasized, appellate courts are not to decide factual questions *de novo*, reversing any findings they would have made differently. See, *e. g.*, *Anderson* v. *Bessemer City*, 470 U. S. 564, 573 (1985); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 123 (1969). The Federal Rules of Criminal Procedure contain no counterpart to Federal Rule of Civil Procedure 52(a), which expressly provides that findings of fact made by the trial judge "shall not be set aside unless clearly erroneous." But the considerations underlying Rule 52(a)—the demands of judicial efficiency, the expertise developed by trial judges, and the importance of first-hand observation, see *Anderson*, *supra*, at 574–575—all apply with full force in the criminal context, at least with respect to factual questions having nothing to do with guilt. Accordingly, the "clearly erroneous" standard of review long has been applied to nonguilt findings of fact by district courts in criminal cases. See *Campbell* v. *United States*, 373 U. S. 487, 493 (1963); 2 C. Wright, Federal Practice and Procedure § 374 (2d ed. 1982). We need not decide now whether all such findings should be reviewed under the "clearly erroneous" standard, because appellee concedes that the standard applies to the factual findings made by the District Court in this case. See Tr. of Oral Arg. 27. We note, however, that no broader review is authorized here simply because this is a constitutional case, or because the factual findings at issue may determine the outcome of the case. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 501 (1984); *Pullman-Standard* v. *Swint*, 456 U. S., at 287.[17]

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[16] The court also noted that "a restriction on the number and size of importations would be less restrictive than a total ban," 752 F. 2d, at 762, but it identified no reason to believe that such a restriction would protect against parasites and commingled species as effectively as a ban.

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[17] In support of its conclusion that it "was free to examine carefully the factual record and to draw its own conclusions," *id.*, at 765, the Court of Appeals cited *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984), and *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318 (1977). The question in each of these cases was whether a given set of facts amounted

No matter how one describes the abstract issue whether "alternative means could promote this local purpose as well without discriminating against interstate commerce," *Hughes* v. *Oklahoma*, 441 U. S., at 336, the more specific question whether scientifically accepted techniques exist for the sampling and inspection of live baitfish is one of fact, and the District Court's finding that such techniques have not been devised cannot be characterized as clearly erroneous. Indeed, the record probably could not support a contrary finding. Two prosecution witnesses testified to the lack of such procedures, and appellee's expert conceded the point, although he disagreed about the need for such tests. See App. 74–75, 184, 265–266. That Maine has allowed the importation of other freshwater fish after inspection hardly demonstrates that the District Court clearly erred in crediting the corroborated and uncontradicted expert testimony that standardized inspection techniques had not yet been developed for baitfish. This is particularly so because the text of the permit statute suggests that it was designed specifically to regulate importation of salmonids, for which, the experts testified, testing procedures had been developed.[18]

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to discrimination forbidden by the Commerce Clause; in neither case did this Court reject underlying factual findings made by the trial court. Indeed, there were no such findings to reject—the facts were stipulated in *Bacchus*, see 468 U. S., at 269, and *Boston Stock Exchange* was decided on a motion to dismiss, see 429 U. S., at 320.

[18] The statute provides: "The commissioner *may* grant permits" for the importation of freshwater fish upon an application that describes the fish and their source and includes "[a] statement from a recognized fish pathologist, from a college or university, from a state conservation department or from the United States Fish and Wildlife Service, certifying that the fish . . . are from sources which show no evidence of viral hemorrhagic septicemia, infectious pancreatic necrosis, infectious hematopoietic necrosis, Myxosomo cerebralis or other diseases which may threaten fish stocks within the State." Me. Rev. Stat. Ann., Tit. 12, § 7202 (1981) (emphasis added). The listed diseases all were identified at the hearing before the Magistrate as salmonid disorders. See App. 193.

Before this Court, appellee does not argue that sampling and inspection procedures already exist for baitfish; he contends only that such procedures "could be easily developed." Brief for Appellee 25. Perhaps this is also what the Court of Appeals meant to suggest. Unlike the proposition that the techniques already exist, the contention that they could readily be devised enjoys some support in the record. Appellee's expert testified that developing the techniques "would just require that those experts in the field . . . get together and do it." App. 271. He gave no estimate of the time and expense that would be involved, however, and one of the prosecution experts testified that development of the testing procedures for salmonids had required years of heavily financed research. See *id.*, at 74. In light of this testimony, we cannot say that the District Court clearly erred in concluding, 585 F. Supp., at 398, n. 11, that the development of sampling and inspection techniques for baitfish could be expected to take a significant amount of time.

More importantly, we agree with the District Court that the "abstract possibility," *id.*, at 398, of developing acceptable testing procedures, particularly when there is no assurance as to their effectiveness, does not make those procedures an "[a]vailabl[e] . . . nondiscriminatory alternativ[e]," *Hunt*, 432 U. S., at 353, for purposes of the Commerce Clause. A State must make reasonable efforts to avoid restraining the free flow of commerce across its borders, but it is not required to develop new and unproven means of protection at an uncertain cost. Appellee, of course, is free to work on his own or in conjunction with other bait dealers to develop scientifically acceptable sampling and inspection procedures for golden shiners; if and when such procedures are developed, Maine no longer may be able to justify its import ban. The State need not join in those efforts, however, and it need not pretend they already have succeeded.

C

Although the Court of Appeals did not expressly overturn the District Court's finding that Maine's import ban serves a legitimate local purpose, appellee argues as an alternative ground for affirmance that this finding should be rejected. After reviewing the expert testimony presented to the Magistrate, however, we cannot say that the District Court clearly erred in finding that substantial scientific uncertainty surrounds the effect that baitfish parasites and nonnative species could have on Maine's fisheries. Moreover, we agree with the District Court that Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible. "[T]he constitutional principles underlying the commerce clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences." 585 F. Supp., at 397.

Nor do we think that much doubt is cast on the legitimacy of Maine's purposes by what the Court of Appeals took to be signs of protectionist intent. Shielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to "simple economic protectionism" consequently have been subject to a "virtually *per se* rule of invalidity." *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978); accord, *e. g.*, *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 471 (1981).[19] But there is little reason in this case to believe that the legitimate justifications the State has put forward for its statute are merely a sham or a "*post hoc* rationalization." *Hughes*, 441 U. S., at 338, n. 20. In suggesting to the contrary, the Court of Appeals relied heavily on a 3-sentence passage near the end of a 2,000-word statement submitted in 1981 by the Maine Department of Inland Fisheries and Wildlife in opposition to appellee's proposed repeal of the State's ban on the importation of live baitfish:

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[19] This rule has been applied not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade, for "the evil of protectionism can reside in legislative means as well as legislative ends." *Philadelphia* v. *New Jersey*, 437 U. S., at 626. The Court has held, for example, that New Jersey may not conserve the disposal capacity of its landfill sites by banning importation of

> "'[W]e can't help asking why we should spend our money in Arkansas when it is far better spent at home? It is very clear that much more can be done here in Maine to provide our sportsmen with safe, home-grown bait. There is also the possibility that such an industry could develop a lucrative export market in neighboring states.'" 752 F. 2d, at 760, quoting Baitfish Importation: The Position of the Maine Department of Inland Fisheries and Wildlife, App. 294, 309–310.

We fully agree with the Magistrate that "[t]hese three sentences do not convert the Maine statute into an economic pro-

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wastes, see *ibid.*, and that Oklahoma may not fight depletion of its population of natural minnows by prohibiting their commercial exportation, see *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979). In each case, out-of-state residents were forced to bear the brunt of the conservation program for no apparent reason other than that they lived and voted in other States. See *Philadelphia* v. *New Jersey*, 437 U. S., at 629; *Hughes*, 441 U. S., at 337–338, and n. 20. Not all intentional barriers to interstate trade are protectionist, however, and the Commerce Clause "is not a guaranty of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community." *Robertson* v. *California*, 328 U. S. 440, 458 (1946). Even overt discrimination against interstate trade may be justified where, as in this case, out-of-state goods or services are particularly likely for some reason to threaten the health and safety of a State's citizens or the integrity of its natural resources, and where "outright prohibition of entry, rather than some intermediate form of regulation, is the only effective method of protecti[on]." *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 43 (1980).

tectionism measure." App. to Juris. Statement E–6, n. 4.[20] As the Magistrate pointed out, the context of the statements cited by appellee "reveals [they] are advanced not in direct support of the statute, but to counter the argument that inadequate bait supplies in Maine require acceptance of the environmental risks of imports. Instead, the Department argues, Maine's own bait supplies can be increased." *Ibid.* Furthermore, the comments were made by a state administrative agency long after the statute's enactment, and thus constitute weak evidence of legislative intent in any event. See *ibid.*[21]

The other evidence of protectionism identified by the Court of Appeals is no more persuasive. The fact that Maine allows importation of salmonids, for which standardized sampling and inspection procedures are available, hardly demonstrates that Maine has no legitimate interest in prohibiting the importation of baitfish, for which such procedures have not yet been devised. Nor is this demonstrated by the fact that other States may not have enacted similar bans, especially given the testimony that Maine's fisheries are unique and unusually fragile.[22] Finally, it is of little relevance that fish can swim directly into Maine from New Hampshire. As the Magistrate explained: "The impediments to complete success . . . cannot be a ground for preventing a state from using its best efforts to limit [an environmental] risk." *Id.*, at E-10, n. 8.

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[20] The District Court did not address appellee's argument that the import ban was protectionist, because it did not believe that appellee had objected to the Magistrate's rejection of that argument. See 585 F. Supp., at 395, n. 5. The Court of Appeals disagreed, concluding that appellee's objections to the Magistrate's recommended decision incorporated all the arguments included in his motion to dismiss. See 752 F. 2d, at 760, n. 7. In the objections he filed with the District Court, appellee did not specifically contend that the statute was protectionist, but he concluded by asking that the indictment be dismissed "[f]or the reasons stated herein and *also for those reasons stated in Defendant's Memorandum of Law in Support of Motion to Dismiss.*" Defendant's Objection to the Magistrate's Recommended Decision on Defendant's Motion to Dismiss Indictment 4 (Mar. 12, 1984) (emphasis added). Because we think the Magistrate was clearly right to reject the argument that Maine's bait statute constitutes economic protectionism, we need not decide whether this catchall language sufficed to preserve the argument for later review. Cf. *Thomas* v. *Arn*, 474 U. S. 140, 148–149 (1985).

[21] The import ban was originally enacted in 1959. See 1959 Me. Acts, ch. 112.

IV

The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to "place itself in a position of economic isolation," *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 527 (1935), it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources. The evidence in this case amply supports the District Court's findings that Maine's ban on the importation of live baitfish serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives. This is not a case of arbitrary discrimination against interstate commerce; the record suggests that Maine has legitimate reasons, "apart from their origin, to treat [out-of-state baitfish] differently," *Philadelphia* v. *New Jersey*, 437 U. S., at 627. The judgment of the Court of Appeals setting aside appellee's conviction is therefore reversed.

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[22] Although Maine's flat statutory ban on the importation of all live baitfish is apparently unique, Minnesota prohibits the use of imported minnows for bait purposes "[e]xcept as otherwise specifically permitted," Minn. Stat. § 101.42, subd. 6 (1984), and several other States require administrative approval for the importation and introduction of any live fish, see, *e. g.*, Utah Code Ann. § 23-15-12 (1984); Va. Code § 28.1-183.2 (1985); Wis. Stat. § 29.535 (Supp. 1985); cf. S. D. Codified Laws § 41-14-30 (1977) (minnows may be transported "into or through South Dakota" only pursuant to a 12-hour permit). Other States have granted authority to their wildlife agencies to prohibit the importation of particular species. See, *e. g.*, Ala. Code § 9-2-13 (1980); N. C. Gen. Stat. § 113-160 (1983); cf. Nev. Rev. Stat. § 503.310(1) (1985) ("The [state wildlife] commission is empowered to regulate or prohibit the use of live bait in fishing to the end that no undesirable species of fish intentionally or unintentionally may be introduced into the public waters of this state").

It is so ordered.

JUSTICE STEVENS, dissenting.

There is something fishy about this case. Maine is the only State in the Union that blatantly discriminates against out-of-state baitfish by flatly prohibiting their importation. Although golden shiners are already present and thriving in Maine (and, perhaps not coincidentally, the subject of a flourishing domestic industry), Maine excludes golden shiners grown and harvested (and, perhaps not coincidentally, sold) in other States. This kind of stark discrimination against out-of-state articles of commerce requires rigorous justification by the discriminating State. "When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333, 353 (1977).

Like the District Court, the Court concludes that uncertainty about possible ecological effects from the possible presence of parasites and nonnative species in shipments of out-of-state shiners suffices to carry the State's burden of proving a legitimate public purpose. *Ante*, at 142–143, 148. The Court similarly concludes that the State has no obligation to develop feasible inspection procedures that would make a total ban unnecessary. *Ante*, at 147. It seems clear, however, that the presumption should run the other way. Since the State engages in obvious discrimination against out-of-state commerce, it should be put to its proof. Ambiguity about dangers and alternatives should actually defeat, rather than sustain, the discriminatory measure.

This is not to derogate the State's interest in ecological purity. But the invocation of environmental protection or public health has never been thought to confer some kind of special dispensation from the general principle of nondiscrimination in interstate commerce. "A different view, that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no restraints on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 354 (1951). If Maine wishes to rely on its interest in ecological preservation, it must show that interest, and the infeasibility of other alternatives, with far greater specificity. Otherwise, it must further that asserted interest in a manner far less offensive to the notions of comity and cooperation that underlie the Commerce Clause.

Significantly, the Court of Appeals, which is more familiar with Maine's natural resources and with its legislation than we are, was concerned by the uniqueness of Maine's ban. That court felt, as I do, that Maine's unquestionable natural splendor notwithstanding, the State has not carried its substantial burden of proving why it cannot meet its environmental concerns in the same manner as other States with the same interest in the health of their fish and ecology. Cf. *ante*, at 151, n. 22 (describing less restrictive procedures in other States).

I respectfully dissent.

ATKINS, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE *v.* RIVERA ET AL.

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 85-632. Argued April 21, 1986—Decided June 23, 1986

The Medicaid program of the Social Security Act (Act) provides medical assistance to persons whose income and resources are insufficient to meet the costs of necessary care and services. States participating in the program must provide coverage to the "categorically needy," that is, persons eligible for cash assistance under either the Supplemental Security Income for the Aged, Blind, and Disabled (SSI) program or the Aid to Families with Dependent Children (AFDC) program. A participating State also may elect to provide Medicaid benefits to the "medically needy," that is, persons who meet the nonfinancial eligibility requirements for cash assistance under AFDC or SSI, but whose income or resources exceed the financial eligibility standards for those programs. Under 42 U. S. C. § 1396a(a)(17), the medically needy may qualify for Medicaid benefits if they incur medical expenses, *i. e.*, "spend down," in an amount that reduces their income to the eligibility level. That section provides that a State is to take into account, "except to the extent prescribed by the Secretary [of Health and Human Services], the costs . . . incurred for medical care," and must determine eligibility under standards that are "reasonable" and "comparable for all groups." Pursuant to § 1396a(a)(17), the Secretary issued a regulation permitting States to employ a maximum spenddown period of six months to compute income of the medically needy. Under § 1396a(a)(10)(C)(i)(III), a state Medicaid plan must prescribe "the single standard to be employed in determining income and resource eligibility for all such groups, and the methodology to be employed in determining such eligibility which shall be the same methodology which would be employed under [AFDC or SSI]." Under the Massachusetts Medicaid plan, persons who lack sufficient income measured on a monthly basis to meet their basic needs automatically qualify for Medicaid. Massachusetts also provides Medicaid benefits to persons who earn enough to meet their basic needs, but whose medical expenses within a 6-month period consume the amount by which their earnings exceed what is required for basic needs. The Massachusetts Department of Public Welfare denied respondents Medicaid benefits because their income exceeded the Medicaid eligibility limit, and they incurred insufficient medical expenses within a 6-month period.

After the denial was upheld on administrative review, respondents sought injunctive relief from the Massachusetts Superior Court against use of the 6-month spenddown period. That court held the period invalid, and the Massachusetts Supreme Judicial Court agreed, holding that in providing that the "same methodology" be used for both the categorically needy and the medically needy, the Act requires that a 1-month period be applied in eligibility calculations for the medically needy.

Held: Massachusetts' 6-month spenddown period for calculating the income of the medically needy does not violate the Act's "same methodology" requirement. Pp. 161–167.

(a) The Secretary's regulation permitting States to employ a maximum spenddown period of six months plainly permits what Massachusetts has done. Because that regulation is supported by the Act's plain language and was adopted pursuant to the Act's explicit grant of rulemaking authority, it is entitled to "legislative effect" and is controlling unless it is arbitrary, capricious, or manifestly contrary to the Act. Pp. 161–162.

(b) The history of the "same methodology" requirement demonstrates that it was never intended to control the length of the spenddown, but rather simply to instruct States to treat components of income similarly for both medically needy and categorically needy persons. Pp. 162–166.

395 Mass. 189, 479 N. E. 2d 639, reversed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

H. Reed Witherby, Assistant Attorney General of Massachusetts, argued the cause for petitioner. With him on the briefs was *Francis X. Bellotti*, Attorney General.

Jerrold J. Ganzfried argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Deputy Solicitor General Geller*, *John F. Cordes*, and *Nicholas S. Zeppos*.

Rene H. Reixach, Jr., argued the cause for respondents and filed a brief for respondent McKenna.*

**Robert Abrams*, Attorney General, *Robert Hermann*, Solicitor General, *Peter H. Schiff*, Deputy Solicitor General, and *Alan W. Rubenstein*, Assistant Attorney General, filed a brief for the State of New York as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Gray Panthers Advocacy Committee et al. by *Roger A. Schwartz* and *Gill Deford*; and for Susan Reed et al. by *Evelyn R. Frank*.

JUSTICE BLACKMUN delivered the opinion of the Court.

This case concerns the means by which a State may calculate eligibility for medical-assistance benefits (Medicaid) under Title XIX of the Social Security Act.

In Massachusetts, persons who lack sufficient income, measured on a monthly basis, to meet their basic needs automatically qualify for Medicaid. The Commonwealth, however, also provides Medicaid benefits to persons, like respondents, who earn enough to meet their basic needs, but whose medical expenses within a 6-month period consume the amount by which their earnings exceed what is required for basic needs. Construing the Act's requirement that assistance for the two groups be calculated using the "same methodology," the Massachusetts Supreme Judicial Court held invalid the Commonwealth's use of a 6-month period for measuring medical expenses. The court ruled that inasmuch as a 1-month period is used to measure the income of those with insufficient means, an identical period must be used to measure medical expenses for persons like respondents. Because this holding conflicts with rulings of two Federal Courts of Appeals,[1] we granted certiorari. 474 U. S. 1018 (1985).

I

Medicaid, enacted in 1965 as Title XIX of the Social Security Act, 79 Stat. 343, as amended, 42 U. S. C. § 1396 *et seq.* (1982 ed. and Supp. II), is designed to provide medical assistance to persons whose income and resources are insufficient to meet the costs of necessary care and services. See *Schweiker* v. *Hogan*, 457 U. S. 569, 571 (1982). The Federal Government shares the costs of Medicaid with States that elect to participate in the program. In return, participating States are to comply with requirements imposed by the Act and by the Secretary of Health and Human Services. See 42 U. S. C. § 1396a (1982 ed. and Supp. II); *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 36–37 (1981).

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[1] See *Hogan* v. *Heckler*, 769 F. 2d 886 (CA1 1985), cert. pending *sub nom. Hogan* v. *Bowen*, No. 85-6386 (construing Massachusetts provision); *DeJesus* v. *Perales*, 770 F. 2d 316 (CA2 1985), cert. pending, No. 85-6337 (construing identical New York provision).

States participating in the Medicaid program must provide coverage to the "categorically needy." 42 U. S. C. § 1396a(a)(10)(A) (1982 ed. and Supp. II). These are persons eligible for cash assistance under either of two programs: Supplemental Security Income for the Aged, Blind, and Disabled (SSI), 42 U. S. C. § 1381 *et seq.* (1982 ed. and Supp. II), or Aid to Families with Dependent Children (AFDC), 42 U. S. C. § 601 *et seq.*[2] (1982 ed. and Supp. II). Congress considered these persons "especially deserving of public assistance" for medical expenses, see *Gray Panthers*, 453 U. S., at 37, because one is eligible for AFDC or SSI only if, in a given month, he or she earns less than what has been determined to be required for the basic necessities of life. AFDC and SSI assistance are intended to cover basic necessities, but not medical expenses. Thus, if a person in this category also incurs medical expenses during that month, payment of those expenses would consume funds required for basic necessities.

A participating State also may elect to provide medical benefits to the "medically needy," that is, persons who meet the nonfinancial eligibility requirements for cash assistance under AFDC or SSI, but whose income or resources exceed the financial eligibility standards of those programs.[3] See

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[2] Congress created SSI in 1972, 86 Stat. 1465, to replace three existing categorical assistance programs—Old Age Assistance, 42 U. S. C. § 301 *et seq.* (1970 ed.); Aid to the Blind, 42 U. S. C. § 1201 *et seq.* (1970 ed.); and Aid to the Permanently and Totally Disabled, 42 U. S. C. § 1351 *et seq.* (1970 ed.). These programs, together with AFDC, previously had been state administered with state-eligibility standards. See *Schweiker* v. *Hogan*, 457 U. S. 569, 581–582, n. 18 (1982).

[3] In Massachusetts, the income eligibility level for the medically needy is comparable in most, but not all, instances to the corresponding SSI or

Schweiker v. *Hogan*, 457 U. S., at 581–582. Under 42 U. S. C. § 1396a(a)(17), the medically needy may qualify for financial assistance for medical expenses if they incur such expenses in an amount that effectively reduces their income to the eligibility level. Only when they "spend down" the amount by which their income exceeds that level, are they in roughly the same position as persons eligible for AFDC or SSI: any further expenditures for medical expenses then would have to come from funds required for basic necessities.

In creating the spenddown mechanism of 42 U. S. C. § 1396a(a)(17) (1982 ed. and Supp. II), Congress provided that a State is to take into account, "except to the extent prescribed by the Secretary, the costs . . . incurred for medical care." Pursuant to this statute, the Secretary of Health and Human Services has instructed state agencies to "use a prospective period of not more than 6 months to compute income" of the medically needy. 42 CFR § 435.831 (1985).

A State electing to assist the medically needy must determine eligibility under standards that are "reasonable" and "comparable for all groups." 42 U. S. C. § 1396a(a)(17). In addition, and significantly for present purposes, state plans for Medicaid must describe

> "the single standard to be employed in determining income and resource eligibility for all such groups, and the methodology to be employed in determining such eligibility which *shall be the same methodology which would be employed* under [AFDC or SSI]." 42 U. S. C. § 1396a(a)(10)(C)(i)(III) (emphasis added).

AFDC standard of need. The maximum income eligibility limits for some medically needy applicants are, in the case of small families (one to three persons), higher than those used for AFDC coverage. See 106 Code of Mass. Regs. §§ 506.410 and 304.410 (1985). This results in some medically needy families in Massachusetts qualifying for Medicaid without use of a spenddown.

II

Respondent Rivera is employed outside her home and is the mother of two children. She receives no medical benefits from her job, and earns an amount slightly in excess of that which would permit her to qualify for AFDC. In 1983, Rivera applied to the Massachusetts Department of Public Welfare for Medicaid. Massachusetts has chosen to participate in the Medicaid program, Mass. Gen. Laws § 118E:1 *et seq.* (1984), and also to provide coverage to medically needy persons.

To determine Rivera's eligibility for Medicaid, the Department first calculated her gross monthly income. See 106 Code of Mass. Regs. (CMR) §§ 505.200, 505.210, 505.320 (1985). Next, the Department prescribed certain deductions and disregards to arrive at her monthly "countable income" of $535.30.[4] See 106 CMR §§ 505.200 and 506.100–506.200 (1985). See also 42 CFR § 435.831(a) (1985). Rivera's monthly countable income exceeded the Medicaid eligibility limit by $100.30. See 106 CMR § 506.400 (1985). See also 42 U. S. C. §§ 1382(c)(1) and 602(a)(13) (1982 ed. and Supp. II). As a result, she did not qualify for Medicaid at that time. She would be able to qualify at a later date, provided her excess income was subject to being consumed or spent down by medical expenses.

Massachusetts has adopted a 6-month period over which the spenddown is calculated. Mass. Gen. Laws § 118E:10 (1984); 106 CMR §§ 506.400 and 506.510 (1985). This is the maximum permitted under the federal regulations. See 42 CFR § 435.831 (1985). Accordingly, the Department multiplied Rivera's excess $100.30 by six; she thus could receive Medicaid during the 6-month period beginning with the date of her first medical service only after she spent down $601.80

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[4] In administrative and state-court proceedings, Rivera raised a challenge to the manner in which certain portions of her income were disregarded. That issue, however, is not presently before this Court.

on medical expenses.[5] The Department's decision denying assistance was upheld by the Welfare Appeals Referee. App. to Pet. for Cert. A46.

Rivera then sought injunctive relief in State Superior Court against use of the 6-month period. She argued that the 6-month period for calculating the income of medically needy applicants violates the "same methodology" requirement of 42 U. S. C. §§ 1396a(a)(10)(C)(i)(III) and 1396a(a)(17) (1982 ed. and Supp. II), because the Act mandates that AFDC and SSI determinations be calculated on the basis of income earned in a 1-month period. The use of the shorter period would have permitted Rivera to receive Medicaid after incurring only $100.30 in medical expenses.[6]

The court certified a class of all persons who have been, are being, or will be subjected to the Department's 6-month spenddown requirement. On a motion for summary judgment, the court found that the Department's use of the 6-month spenddown period violated the statutory requirement that the "same methodology" be used for determining eligibility of the medically needy as is used for the categorically needy. App. to Pet. for Cert. A28.

The Department appealed to the Massachusetts Supreme Judicial Court. It argued there that, since the eligibility determination for the categorically needy does not involve a spenddown at all, there is no methodology for the Department to match. The Department further argued that federal regulations explicitly allow a 6-month period.

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[5] The spenddown may be satisfied by submission of paid or unpaid medical bills. 106 CMR § 506.540 (1985).

[6] Respondent Madeline McKenna was permitted to intervene in the Superior Court proceedings. McKenna, like Rivera, was denied Medicaid. McKenna's monthly countable income was calculated to be $531.66, which is $106.66 in excess of the $425 eligibility standard for a family of two. Thus, McKenna could receive medical assistance only after incurring medical expenses of $639.96 in a 6-month period.

The Supreme Judicial Court, by a unanimous panel vote, held that the Massachusetts requirement for a 6-month spenddown period was invalid. *Rivera* v. *Commissioner of Public Welfare*, 395 Mass. 189, 479 N. E. 2d 639 (1985). It relied in part, *id.*, at 197, 479 N. E. 2d, at 644–645, on a ruling by the United States District Court for the District of Massachusetts sustaining an identical challenge to the Department's 6-month spenddown regulation. See *Hogan* v. *Heckler*, 597 F. Supp. 1106, 1110–1113 (1984), subsequently reversed, 769 F. 2d 886 (CA1 1985), cert. pending *sub nom. Hogan* v. *Bowen*, No. 85–6386. Although noting that eligibility determinations for the categorically needy do not involve spenddowns, the court observed that such determinations do require the use of a 1-month computation period. Therefore, it concluded, in providing that the "same methodology" be employed, the Act requires that a 1-month period be applied in eligibility calculations for the medically needy.

III

Congress created the spenddown provision in 1965 to eliminate a perceived weakness in the medical-assistance program then in effect. See Social Security Amendments of 1960, § 601(a), 74 Stat. 987. A 1965 Senate Report explained that under existing law some States used an absolute-income cutoff point. An individual with income just under the specified limit thus was able to obtain all the aid provided under the state plan, while one with income just over the limit was unable to obtain any assistance, even if the excess income was small when compared with the cost of the medical care needed. See S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 78 (1965).

To cure this problem, the Medicaid statute was amended to require state eligibility standards to measure income in terms of both the State's allowance for basic maintenance needs *and* the cost of the medical care required. The standards applied to the medically needy are to be "reasonable" and "comparable for all groups." Congress imposed no further instruction on the spenddown, stating only that a State is to take into account the costs incurred for medical care, "except to the extent prescribed by the Secretary." 42 U. S. C. § 1396a(a)(17).

Pursuant to this authority, the Secretary has provided, from the inception of Medicaid until the present time, that States may employ a maximum spenddown period of six months. See 45 CFR § 248.21(a)(4) (1970), originally promulgated as HEW Handbook of Public Assistance Administration, Supplement D, Medical Assistance Programs, D–4220(A)(4) (June 17, 1966). This regulation plainly permits what Massachusetts has done. We long have recognized that, perhaps due to the intricacy of the Act, "Congress conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the Act." *Gray Panthers*, 453 U. S., at 43. See *Batterton* v. *Francis*, 432 U. S. 416, 425 (1977). The broad delegation to the Secretary in the spenddown provision includes the authority to provide the period in which the spenddown is to be calculated. Because the Secretary's regulation appears supported by the plain language of the statute and is adopted pursuant to the explicit grant of rulemaking authority in § 1396a(a)(17), it is "'entitled to more than mere deference or weight.'" *Gray Panthers*, 453 U. S., at 44, quoting *Batterton* v. *Francis*, 432 U. S., at 426. Indeed, it is entitled to "legislative effect," *id.*, at 425, and is controlling "unless [it is] arbitrary, capricious, or manifestly contrary to the statute," *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984).

IV

A

Respondents contend that the Secretary's regulation, and Massachusetts' 6-month spenddown enacted pursuant thereto, are "manifestly contrary to the statute." Respondents point to another section of the Act, 42 U. S. C. § 1396a(a)(10)(C) (i)(III), requiring that a State's plan describe "the single standard to be employed in determining income . . . eligibility . . . and the methodology to be employed in determining such eligibility, which shall be the same methodology" employed under SSI or AFDC. To respondents, this statutory language is an express congressional mandate that the same methodology, here the 1-month budget period, be applied to eligibility determinations for the medically needy. This requirement, the argument goes, operates as an express limitation on the Secretary's authority to regulate the state administration of spenddowns. Similarly, it is a direct restriction on the States, requiring them to use a 1-month period in which the medically needy must spend down, on medical expenses, their excess income.

B

The history of the "same methodology" proviso, which first appeared in the Act in 1981, demonstrates that it was never intended to control the length of the spenddown. Rather, the "same methodology" requirement simply instructs States to treat components of income—*e. g.*, interest or court-ordered support payments—similarly for both medically and categorically needy persons.

The "same methodology" proviso was not Congress' first attempt to regulate the relationship between treatment of the categorically needy and treatment of the medically needy. To understand the precise purpose of the "same methodology" proviso requires a brief foray into Congress' earlier efforts to address this relationship, for the proviso reflects Congress' desire to overrule a particular interpretation that had been advanced by the Secretary.

When Medicaid was first enacted, Congress did not require that the "same methodology" be used for determining the eligibility of categorically and medically needy individuals. Instead, it required only that a State's Medicaid plan use "comparable" standards for both groups.[7] The Secretary and several Courts of Appeals interpreted the original "comparability" language to require virtually identical treatment. See, *e. g.*, 38 Fed. Reg. 32216 (1973), originally codified as 45 CFR § 248.2; *Caldwell* v. *Blum*, 621 F. 2d 491, 495 (CA2 1980), cert. denied, 452 U. S. 909 (1981); *Greklek* v. *Toia*, 565 F. 2d 1259, 1261 (CA2 1977), cert. denied *sub nom.* *Blum* v. *Toomey*, 436 U. S. 962 (1978); *Fabula* v. *Buck*, 598 F. 2d 869, 872–873 (CA4 1979). Notably, no one advanced the claim that this "comparability" language prevented States from using a spenddown period of up to six months.[8]

Congress concluded that the administrative and judicial interpretation of the "comparability" provision denied States necessary flexibility to set eligibility standards and to adjust the scope of services to fit the varying requirements of medically needy persons. See H. R. Rep. No. 97–208, p. 971 (1981). Thus, as part of the Omnibus Budget Reconciliation Act of 1981 (OBRA), 95 Stat. 357, Congress amended the

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[7] The 1965 legislation was to the effect that a State choosing to extend assistance to the medically needy provide "for making medical or remedial care and services available to all individuals who would, if needy, be eligible for aid or assistance under any . . . State [cash assistance program] and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical or remedial care and services." 79 Stat. 345.

[8] The current version of the Act also contains a "comparability" requirement. See § 42 U. S. C. § 1396a(a)(17). Although the Supreme Judicial Court did not rely on "comparability" in arriving at its result, we note that that requirement did not mandate the use of a 1-month spenddown. The very purpose of § 1396a(a)(17) is to regulate the standards under which persons having incomes higher than allowed in the cash-assistance programs may still qualify for Medicaid; therefore, "comparability" cannot be read to require that the standards must be identical with those in the cash-assistance programs. Because the medically and categorically needy are different in a fundamental way, this Court previously has recognized that the comparability provisions of Medicaid "did not require that the medically needy be treated comparably to the categorically needy in all respects." *Schweiker* v. *Hogan*, 457 U. S. 569, 587 (1982). See *DeJesus* v. *Perales*, 770 F. 2d, at 323–324; *Hogan* v. *Heckler*, 769 F. 2d, at 891–897.

Medicaid Act by deleting the "comparability" requirement. After the amendment, a State was required only to include in its plan for the medically needy "a description of . . . the criteria for determining eligibility of individuals . . . for medical assistance." OBRA § 2171(a)(3)(C)(i), 95 Stat. 807.

The Secretary interpreted OBRA to authorize States to use income and resource criteria for medically needy different from those for categorically needy individuals:

> "States are no longer required to apply a uniform methodology for treating income and resources in such matters as deemed income, interest, court-ordered support payments, and infrequent and irregular income. Rather, the State plan must specify the methodology that will be used, and that methodology must be reasonable." 46 Fed. Reg. 47980 (1981).

The regulations promulgated by the Secretary accordingly left the States free to use eligibility standards that were unrelated to the standards used in AFDC or SSI, as long as the standards were "reasonable."[9] The Secretary's regulations did not address treatment of excess income for the medically needy or the calculation of spenddowns. Despite the various changes that followed OBRA's passage, many States continued to use a 6-month spenddown, in conformity with the still-existing regulation permitting that choice.

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[9] The Secretary further explained:

"Before the 1981 Amendments, the methodology for treatment of income and resources of the medically needy depended on the individual's relationship to a specific cash assistance program. For example, the methodology for deeming the income of medically needy aged, blind, and disabled was taken from the SSI program. . . . [T]he 1981 Amendments revised the Medicaid statute so that the direct linkage between the cash assistance programs and the medically needy is no longer explicit. . . . Therefore, we have concluded that the State need not adopt the methodology of a related cash assistance program in treating income and resources of the medically needy. Rather, the State may develop its own. However, section 1902(a)(17)(C) of the Act has not been amended. Consequently, these final regulations require that the State must use a methodology for the treatment of income and resources that is reasonable." 46 Fed. Reg. 47980 (1981).

Congress disagreed with the Secretary's interpretation. See, *e. g.*, 127 Cong. Rec. 23363 (1981) (remarks of Rep. Waxman). This disagreement led to the enactment of the "same methodology" proviso, as part of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), § 137(a)(8), 96 Stat. 378. The House Report explained that TEFRA "makes clear that the Department [of Health and Human Services] had no authority to alter the rules that applied before September 30, 1981, with respect to medically needy income levels, medically needy resource standards, and the methodology for treating medically needy income and resources." H. R. Rep. No. 97-757, pt. 1, p. 13 (1982). The House Report further explained that TEFRA reaffirmed "the financial requirements previously in effect for the medically needy." *Ibid.*

Thus, the "same methodology" proviso was designed to correct a problem wholly unrelated to the 6-month spenddown, which had remained in force from the inception of Medicaid. The proviso operated solely to invalidate the post-OBRA regulations permitting the income and resource standards in state Medicaid plans to deviate from those used in the AFDC and SSI programs in "such matters as deemed income, interest, court-ordered support payments, and infrequent and irregular income." See 46 Fed. Reg. 47980 (1981). Treatment of excess income and the calculation of spenddowns were left untouched by the "same methodology" proviso.[10]

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[10] Subsequent legislative history is to the same effect and makes clear that TEFRA did not address the length of the spenddown. In the Deficit Reduction Act of 1984, § 2373(c)(1), 98 Stat. 1112, Congress amended § 1396a(a)(17) to impose a moratorium on disapproving state Medicaid plans that might be inconsistent with the "same methodology" requirement. In doing so, Congress reaffirmed that its sole intent in enacting the "same methodology" requirement had been to invalidate the Secretary's 1981 regulations. See H. R. Rep. No. 98-861, pp. 1366-1367 (1984).

V

The Medicaid Act itself is silent as to how many months' excess income the State may require an individual or a family to contribute to medical expenses before Medicaid coverage of further medical expenses begins. The Secretary's interpretation of the Act is consistent with congressional intent, and under that interpretation Massachusetts is free to choose a 6-month spenddown. Accordingly, the judgment of the Supreme Judicial Court is reversed.

It is so ordered.

DARDEN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-5319. Argued January 13, 1986—Decided June 23, 1986

After a jury trial in a Florida court, petitioner was found guilty of murder, robbery, and assault with intent to kill. Pursuant to Florida's capital sentencing statute, the same jury heard further testimony and argument, and made a nonbinding recommendation that the death penalty be imposed. The trial judge followed that recommendation, and the Florida Supreme Court affirmed the conviction and the sentence, rejecting petitioner's contention that the prosecution's closing argument during the guilt phase of the trial rendered the trial fundamentally unfair and deprived the sentencing determination of the reliability required by the Eighth Amendment. The court also rejected petitioner's contention that the trial court erred in excluding a member of the venire for cause on the basis of his affirmative response to the judge's question during *voir dire* "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?" In subsequent federal habeas corpus proceedings, petitioner raised the same claims, as well as the additional claim that he had been denied effective assistance of counsel at the sentencing phase of his trial. The District Court denied relief, and the Court of Appeals ultimately affirmed the District Court's judgment in all of its aspects.

Held:

1. The record of the jury *voir dire*, viewed in its entirety, shows that the trial court's decision to exclude the juror involved here was proper. *Wainwright* v. *Witt*, 469 U. S. 412, held that the proper test is whether a juror's views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. Petitioner's argument on this issue rested solely on the wording of the question (quoted above) that the trial court asked the juror before excluding him. However, a proper determination of the issue requires examination of the context surrounding the juror's exclusion. The record shows that prior to individual questioning the trial court told the entire venire that they would be questioned on this point, and that the juror in question was present while the court re-

best copy available

peatedly stated the correct standard when questioning other individual members of the panel. Pp. 175–178.

2. The record also supports the rejection of petitioner's contention as to the prosecution's closing argument. The prosecution's argument included improper remarks that indicated that petitioner was on weekend furlough from an earlier prison sentence when the crime involved here occurred; implied that the death penalty would be the only guarantee against a future similar act; referred to petitioner as an "animal"; and reflected an emotional reaction to the case. However, the relevant question is whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Viewed under this standard, the prosecution's comments did not deprive petitioner of a fair trial. The comments did not manipulate or misstate the evidence, or implicate other specific rights of the accused, and much of their objectionable content was responsive to the opening summation of the defense (available under a state procedural rule). Moreover, defense counsel were able to use their final rebuttal argument to turn much of the prosecution's closing argument against it. Pp. 178–183.

3. With respect to the claim of ineffective assistance of counsel at the sentencing phase of the trial, petitioner failed to satisfy the first part of the two-part test set forth in *Strickland* v. *Washington*, 466 U. S. 668, that his trial counsels' performance fell below an objective standard of reasonableness. There is no merit to petitioner's contention that trial counsel devoted only the time between the close of the guilt phase of trial and the start of the penalty phase—approximately one-half hour—to prepare the case in mitigation. The record indicates that a great deal of time and effort went into the defense of this case; a significant portion of that time was devoted to preparation for sentencing. Moreover, a defendant must overcome the presumption that, under the circumstances, the challenged action of counsel might be considered sound trial strategy. Petitioner did not overcome that presumption here. The record shows several reasons why counsel reasonably could have chosen to rely on a simple plea for mercy from petitioner himself, rather than to attempt to introduce mitigating evidence. Pp. 184–187.

767 F. 2d 752, affirmed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, and O'CONNOR, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p, 187. BRENNAN, J., filed a dissenting opinion, *post*, p. 188. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 188.

Robert Augustus Harper, Jr., argued the cause and filed briefs for petitioner.

Richard W. Prospect, Assistant Attorney General of Florida, argued the cause for respondent. With him on the brief was *Jim Smith*, Attorney General.

JUSTICE POWELL delivered the opinion of the Court.

This case presents three questions concerning the validity of petitioner's criminal conviction and death sentence: (i) whether the exclusion for cause of a member of the venire violated the principles announced in *Wainwright* v. *Witt*, 469 U. S. 412 (1985); (ii) whether the prosecution's closing argument during the guilt phase of a bifurcated trial rendered the trial fundamentally unfair and deprived the sentencing determination of the reliability required by the Eighth Amendment; and (iii) whether petitioner was denied effective assistance of counsel at the sentencing phase of his trial.

I

Petitioner was tried and found guilty of murder, robbery, and assault with intent to kill in the Circuit Court for Citrus County, Florida, in January 1974. Pursuant to Florida's capital sentencing statute, the same jury that convicted petitioner heard further testimony and argument in order to make a nonbinding recommendation as to whether a death sentence should be imposed. The jury recommended a death sentence, and the trial judge followed that recommendation. On direct appeal, the Florida Supreme Court affirmed the conviction and the sentence. Petitioner made several of the same arguments in that appeal that he makes here. With respect to the prosecutorial misconduct claim, the court disapproved of the closing argument, but reasoned that the law required a new trial "only in those cases in which it is reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt . . . or in which the comment is unfair." *Darden* v. *State*, 329 So. 2d 287, 289 (1976). It concluded that the comments had not rendered petitioner's trial unfair. Petitioner's challenge to the juror exclusion was rejected without comment. Petitioner did not at that time raise his claim of ineffective assistance of counsel. This Court granted certiorari, 429 U. S. 917 (1976), limited the grant to the claim of prosecutorial misconduct, 429 U. S. 1036 (1977), heard oral argument, and dismissed the writ as improvidently granted, 430 U. S. 704 (1977).

Petitioner then sought federal habeas corpus relief, raising the same claims he raises here. The District Court denied the petition. *Darden* v. *Wainwright*, 513 F. Supp. 947 (MD Fla. 1981). A divided panel of the Court of Appeals for the Eleventh Circuit affirmed. *Darden* v. *Wainwright*, 699 F. 2d 1031 (1983). The Court of Appeals granted rehearing en banc, and affirmed the District Court by an equally divided court. 708 F. 2d 646 (1983). Following a second rehearing en banc the Court of Appeals reversed on the claim of improper excusal of a member of the venire. 725 F. 2d 1526 (1984). This Court granted the State's petition for certiorari on that claim, vacated the Court of Appeals' judgment, and remanded for reconsideration in light of *Wainwright* v. *Witt*. 469 U. S. 1202 (1985). On remand, the en banc court denied relief, 767 F. 2d 752 (1985). Petitioner filed an application for a stay of his execution that this Court treated as a petition for certiorari and granted, at the same time staying his execution. 473 U. S. 928 (1985). We now affirm.

II

Because of the nature of petitioner's claims, the facts of this case will be stated in more detail than is normally necessary in this Court. On September 8, 1973, at about 5:30 p.m., a black adult male entered Carl's Furniture Store near Lakeland, Florida. The only other person in the store was the proprietor, Mrs. Turman, who lived with her husband in a house behind the store. Mr. Turman, who worked nights at a juvenile home, had awakened at about 5 p.m., had a cup of coffee at the store with his wife, and returned home to let their dogs out for a run. Mrs. Turman showed the man around the store. He stated that he was interested in purchasing about $600 worth of furniture for a rental unit, and asked to see several different items. He left the store briefly, stating that his wife would be back to look at some of the items.

The same man returned just a few minutes later asking to see some stoves, and inquiring about the price. When Mrs. Turman turned toward the adding machine, he grabbed her and pressed a gun to her back, saying "Do as I say and you won't get hurt." He took her to the rear of the store and told her to open the cash register. He took the money, then ordered her to the part of the store where some box springs and mattresses were stacked against the wall. At that time Mr. Turman appeared at the back door. Mrs. Turman screamed while the man reached across her right shoulder and shot Mr. Turman between the eyes. Mr. Turman fell backwards, with one foot partially in the building. Ordering Mrs. Turman not to move, the man tried to pull Mr. Turman into the building and close the door, but could not do so because one of Mr. Turman's feet was caught in the door. The man left Mr. Turman faceup in the rain, and told Mrs. Turman to get down on the floor approximately five feet from where her husband lay dying. While she begged to go to her husband, he told her to remove her false teeth. He unzipped his pants, unbuckled his belt, and demanded that Mrs. Turman perform oral sex on him. She began to cry "Lord, have mercy." He told her to get up and go towards the front of the store.

Meanwhile, a neighbor family, the Arnolds, became aware that something had happened to Mr. Turman. The mother sent her 16-year-old son Phillip, a part-time employee at the furniture store, to help. When Phillip reached the back door he saw Mr. Turman lying partially in the building. When Phillip opened the door to take Turman's body inside, Mrs. Turman shouted "Phillip, no, go back." Phillip did not know what she meant and asked the man to help get Turman inside. He replied, "Sure, buddy, I will help you." As Phillip looked up, the man was pointing a gun in his face. He pulled the trigger and the gun misfired; he pulled the trigger again and shot Phillip in the mouth. Phillip started to run away, and was shot in the neck. While he was still running, he was shot a third time in the side. Despite these wounds, Phillip managed to stumble to the home of a neighbor, Mrs. Edith Hill. She had her husband call an ambulance while she tried to stop Phillip's bleeding. While she was helping Phillip, she saw a late model green Chevrolet leave the store and head towards Tampa on State Highway 92. Phillip survived the incident; Mr. Turman, who never regained consciousness, died later that night.

Minutes after the murder petitioner was driving towards Tampa on Highway 92, just a few miles away from the furniture store. He was out on furlough from a Florida prison, and was driving a car borrowed from his girl friend in Tampa. He was driving fast on a wet road. Petitioner testified that as he came up on a line of cars in his lane, he was unable to slow down. He attempted to pass, but was forced off the road to avoid a head-on collision with an oncoming car. Petitioner crashed into a telephone pole. The driver of the oncoming car, John Stone, stopped his car and went to petitioner to see if he could help. Stone testified that as he approached the car, petitioner was zipping up his pants and buckling his belt. Police at the crash site later identified petitioner's car as a 1969 Chevrolet Impala of greenish golden brown color. Petitioner paid a bystander to give him a ride to Tampa. Petitioner later returned with a wrecker, only to find that the car had been towed away by the police.

By the time the police arrived at the scene of the accident, petitioner had left. The fact that the car matched the description of the car leaving the scene of the murder, and that the accident had occurred within three and one-half miles of the furniture store and within minutes of the murder, led police to suspect that the car was driven by the murderer. They searched the area. An officer found a pistol—a revolver—about 40 feet from the crash site. The arrangement of shells within the chambers exactly matched the pattern that should have been found in the murder weapon: one shot, one misfire, followed by three shots, with a live shell remaining in the next chamber to be fired. A specialist for the Federal Bureau of Investigation examined the pistol and testified that it was a Smith & Wesson .38 special revolver. It had been manufactured as a standard .38; it later was sent to England to be rebored, making it a much rarer type of gun than the standard .38. An examination of the bullet that killed Mr. Turman revealed that it came from a .38 Smith & Wesson special.

On the day following the murder petitioner was arrested at his girl friend's house in Tampa. A few days later Mrs. Turman identified him at a preliminary hearing as her husband's murderer. Phillip Arnold selected petitioner's picture out of a spread of six photographs as the man who had shot him.[1] By that time, a Public Defender had been appointed to represent petitioner.

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[1] There are some minor discrepancies in the eyewitness identification. Mrs. Turman first described her assailant immediately after the murder while her husband was being taken to the emergency room. She told the investigating officer that the attacker was a heavy-set man. Tr. 237. When asked if he was "neat in his appearance, clean-looking, clean-shaven," she responded "[a]s far as I can remember, yes, sir." *Ibid.* She also stated to the officer that she thought that the attacker was about her height, 5′ 6″ tall, and that he was wearing a pullover shirt with a stripe around the neck. *Id.*, at 227. The first time she saw petitioner after the attack was when she identified him at the preliminary hearing. She had not read any newspaper accounts of the crime, nor had she seen any picture of petitioner. When she was asked if petitioner was the man who had committed the crimes, she said yes. She also repeatedly identified him at trial.

Phillip Arnold first identified petitioner in a photo lineup while in the hospital. He could not speak at the time, and in response to the written question whether petitioner had a mustache, Phillip wrote back "I don't

As petitioner's arguments all relate to incidents in the course of his trial, they will be taken up, together with the relevant facts, in chronological order.

III

Petitioner contends that one member of the venire, Mr. Murphy, was excluded improperly under the test enunciated in *Wainwright* v. *Witt*, 496 U. S. 412 (1985). That case modified this Court's opinion in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968). *Witherspoon* had held that potential jurors may be excused for cause when their opposition to the death penalty is such that they automatically would vote against a sentence of death or would be impaired in the task of determining defendant's guilt. *Witt* held that the proper test is whether the juror's views on capital punishment would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" 469 U. S., at 424, quoting *Adams* v. *Texas*, 448 U. S. 38, 45 (1980). *Witt* also made clear that the trial judge's determination that a potential juror is impermissibly biased is a factual finding entitled to a presumption of correctness under 28 U. S. C. § 2254.

Petitioner's argument on this issue relies solely on the wording of a question the trial court asked Murphy before excluding him. The court asked: "Do you have any moral or religious, conscientious moral or religious principles in oppo-

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think so." *Id.*, at 476. Phillip also testified at trial that the attacker was a heavy-set man wearing a dull, light color knit shirt with a ring around the neck. *Id.*, at 443. He testified that the man was almost his height, about 6′ 2″ tall.

A motorist who stopped at the scene of the accident testified that petitioner was wearing a white or off-grey button-down shirt and that he had a slight mustache. *Id.*, at 313, 318–320. In fact, the witness stated that he "didn't know it was that [the mustache] or the raindrops on him or not I couldn't really tell that much to it, it was real thin, that's all." *Id.*, at 318–319. Petitioner is about 5′ 10″ tall, and at the time of trial testified that he weighed about 175 pounds.

sition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?" App. 9. Petitioner argues that this question does not correctly state the relevant legal standard. As *Witt* makes clear, however, our inquiry does not end with a mechanical recitation of a single question and answer. 469 U. S., at 424–426. We therefore examine the context surrounding Murphy's exclusion to determine whether the trial court's decision that Murphy's beliefs would "substantially impair the performance of his duties as a juror" was fairly supported by the record.

During *voir dire*, but prior to individual questioning on this point, the trial court spoke to the entire venire, including Murphy, saying:

> "Now I am going to ask each of you individually the same question so listen to me carefully, I want to know if any of you have such strong religious, moral or conscientious principles in opposition to the death penalty that you would be unwilling to vote to return an advisory sentence recommending the death sentence even though the facts presented to you should be such as under the law would require that recommendation? Do you understand my question?"

The court then proceeded to question the members of the venire individually, but did so while the entire venire was present in the courtroom. Thus, throughout the individual questioning, all the veniremen could hear the questions and answers. In fact, the prosecution frequently incorporated prior questioning of other veniremen by reference, each time with the assurance from the individual being questioned that he or she had heard and understood the previous questions. See Tr. 89–90, 112, 141–142; see also *id.*, at 150.

The court repeatedly stated the correct standard when questioning individual members of the venire.[2] Murphy was present and heard the court ask the proper *Witherspoon* question over and over again.[3] After many instances of such questioning, Murphy was seated in the jury box. The court first asked Murphy his occupation, and learned that he was retired, but had spent the eight years before retirement working in the administration office of St. Pios Seminary. As previously noted, the court then asked: "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?" After Murphy responded "Yes, I have" he was excused.

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[2] Prior to *voir dire* defense counsel objected to any questioning by the prosecution regarding a potential juror's feelings about the death penalty. The judge denied the motion, stating:

"It is my ruling if a prospective juror states on his voir dire examination that because of his moral, religious or conscientious principles and belief he would be unwilling to recommend a death penalty, even though the facts and circumstances meet the requirements of law, then he in effect has said he would be unwilling to follow the law . . . ." App. 6.

Although the judge correctly stated the general standard for dismissal, he assured defense counsel that they were free to make an objection to any particular *Witherspoon* question that was otherwise objectionable or that had "gone too far." *Id.*, at 7.

[3] For example, the court asked Mrs. Macy: "[D]o you hold such conscientious moral or religious principles in opposition to the death penalty that you would be unwilling under any circumstances to recommend the death sentence?" Tr. 44. To Mr. Varney, who responded affirmatively to the above question, the court asked further: "[I]n the event that the evidence should be such that under the law that should be the legal recommendation you would be unwilling to return such a recommendation because of your conscientious beliefs?" *Ibid.* When three new veniremen replaced others who had been excused, the court asked: "Do either of the three of you hold such strong religious, moral or conscientious principles in opposition to the imposition of the death penalty that you would be unwilling to vote to recommend the death penalty regardless of what the evidence was?" *Id.*, at 88. At a similar point later on, the court explained to replacements from the venire that "I have asked the others and I will ask each of the four of you whether you have such strong religious, conscientious or moral principles against the imposition of the death penalty that you would be unwilling to vote to return a recommended sentence of the death penalty regardless of what the evidence or the facts might be?" *Id.*, at 109. When one of the four expressed reservations, the court once again followed up with further questioning, demonstrating its practice of assuring itself, if there was any doubt, of the potential juror's true position. See also *id.*, at 107. During the *voir dire* examination prior to Murphy, four potential jurors were excused on *Witherspoon* grounds.

The precise wording of the question asked of Murphy, and the answer he gave, do not by themselves compel the conclusion that he could not under any circumstance recommend the death penalty. But *Witt* recognized that "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." 469 U. S., at 424. The trial court, "aided as it undoubtedly was by its assessment of [the potential juror's] demeanor," *id.*, at 434, was under the obligation to determine whether Murphy's views would "'prevent or substantially impair the performance of his duties as a juror,'" *id.*, at 424. In making this determination, the trial court could take account of the fact that Murphy was present throughout an entire series of questions that made the purpose and meaning of the *Witt* inquiry absolutely clear. No specific objection was made to the excusal of Murphy by defense counsel. Nor did the court perceive, as it had previously, any need to question further. Viewing the record of *voir dire* in its entirety, we agree with the reasoning of the Court of Appeals that the trial court's decision to exclude this juror was proper. 767 F. 2d, at 754.

IV

Petitioner next contends that the prosecution's closing argument at the guilt-innocence stage of the trial rendered his conviction fundamentally unfair and deprived the sentencing determination of the reliability that the Eighth Amendment requires.

It is helpful as an initial matter to place these remarks in context. Closing argument came at the end of several days of trial. Because of a state procedural rule[4] petitioner's counsel had the opportunity to present the initial summation as well as a rebuttal to the prosecutors' closing arguments. The prosecutors' comments must be evaluated in light of the defense argument that preceded it, which blamed the Polk County Sheriff's Office for a lack of evidence,[5] alluded to the death penalty,[6] characterized the perpetrator of the crimes as an "animal,"[7] and contained counsel's personal opinion of the strength of the State's evidence.[8]

The prosecutors then made their closing argument. That argument deserves the condemnation it has received from every court to review it, although no court has held that the argument rendered the trial unfair. Several comments attempted to place some of the blame for the crime on the

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[4] Rule 3.250 of the Florida Rules of Criminal Procedure (1973) provided that "a defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the jury."

[5] "The Judge is going to tell you to consider the evidence or the lack of evidence. We have a lack of evidence, almost criminally negligent on the part of the Polk County Sheriff's Office in this case. You could go on and on about it." Tr. 728.

[6] "They took a coincidence and magnified that into a capital case. And they are asking you to kill a man on coincidence." *Id.*, at 730.

[7] "The first witness that you saw was Mrs. Turman, who was a pathetic figure; who worked and struggled all of her life to build what little she had, the little furniture store; and a woman who was robbed, sexually assaulted, and then had her husband slaughtered before her eyes, by what would have to be a vicious animal." *Id.*, at 717. "And this murderer ran after him, aimed again, and this poor kid with half his brains blown away. . . . It's the work of an animal, there's no doubt about it." *Id.*, at 731–732.

[8] "So they come on up here and ask Citrus County people to kill the man. You will be instructed on lesser included offenses. . . . The question is, do they have enough evidence to kill that man, enough evidence? And I honestly do not think they do." *Id.*, at 736–737.

Division of Corrections, because Darden was on weekend furlough from a prison sentence when the crime occurred.[9] Some comments implied that the death penalty would be the only guarantee against a future similar act.[10] Others incorporated the defense's use of the word "animal."[11] Prosecutor McDaniel made several offensive comments reflecting an emotional reaction to the case.[12] These comments undoubtedly were improper. But as both the District Court and the original panel of the Court of Appeals (whose opinion on this issue still stands) recognized, it "is not enough that the prosecutors' remarks were undesirable or even universally condemned." *Darden* v. *Wainwright*, 699 F. 2d, at 1036. The relevant question is whether the prosecutors' comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974). Moreover, the appropriate standard of review for such a claim on writ of habeas corpus is "the narrow one of due process, and not the broad exercise of supervisory power." *Id.*, at 642.

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[9] "As far as I am concerned, there should be another Defendant in this courtroom, one more, and that is the division of corrections, the prisons. . . . Can we expect him to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?" App. 15-16. "Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them." *Id.*, at 16.

[10] "I will ask you to advise the Court to give him death. That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now, because the people that turned him loose—." *Id.*, at 17-18.

[11] "As far as I am concerned, and as Mr. Maloney said as he identified this man, this person as an animal, this animal was on the public for one reason." *Id.*, at 15.

[12] "He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash." *Id.*, at 16. "I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his [Darden's] face off. I wish that I could see him sitting here with no face, blown away by a shotgun." *Id.*, at 20. "I wish someone had walked in the back door and blown his head off at that point." *Ibid.* "He fired in the boy's back, number five, saving one. Didn't get a chance to use it. I wish he had used it on himself." *Id.*, at 28. "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time." *Id.*, at 29. "[D]on't forget what he has done according to those witnesses, to make every attempt to change his appearance from September the 8th, 1973. The hair, the goatee, even the moustache and the weight. The only thing he hasn't done that I know of is cut his throat." *Id.*, at 31. After this, the last in a series of such comments, defense counsel objected for the first time.

Under this standard of review, we agree with the reasoning of every court to consider these comments that they did not deprive petitioner of a fair trial.[13] The prosecutors' argu-

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[13] JUSTICE BLACKMUN's dissenting opinion argues that because of prosecutorial misconduct petitioner did not receive a fair trial. The dissent states that the Court is "willing to tolerate not only imperfection but a level of fairness and reliability so low it should make conscientious prosecutors cringe." *Post*, at 189. We agree that the argument was, and deserved to be, condemned. *Supra*, at 179. Conscientious prosecutors will recognize, however, that *every court* that criticized the argument went on to hold that the *fairness* of petitioner's trial was not affected by the prosecutors' argument.

On direct appeal in 1976, the Florida Supreme Court so held after a careful review of the "totality of the record." *Darden* v. *State*, 329 So. 2d 287, 290–291. On the first federal habeas petition, the District Court considered the prosecution's closing argument at length and denied the petition. It concluded after a "thorough review of the record" that it was "convinced that no relief is warranted." *Darden* v. *Wainwright*, 513 F. Supp. 947, 958 (MD Fla. 1981). "Darden's trial was not perfect—few are—but neither was it fundamentally unfair." *Ibid.* The original panel of the Court of Appeals affirmed the District Court's holding with respect to the prosecutors' argument. It stated that it had "considered the prosecutors' remarks and evaluated them in light of Darden's entire trial," and that it "agree[d] with the district court's conclusion that the prosecutors' comments did not deny Darden a fundamentally fair trial." 699 F. 2d 1031, 1036–1037 (1983). When the Court of Appeals reheard the case en banc ment did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent. See *Darden* v. *Wainwright*, 513 F. Supp., at 958. Much of the objectionable content was invited by or was responsive to the opening summation of the defense. As we explained in *United States* v. *Young*, 470 U. S. 1 (1985), the idea of "invited response" is used not to excuse improper comments, but to determine their effect on the trial as a whole. *Id.*, at 13. The trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence. The weight of the evidence against petitioner was heavy; the "overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges," 329 So. 2d, at 291, reduced the likelihood that the jury's decision was influenced by argument. Finally, defense counsel made the tactical decision not to present any witness other than petitioner. This decision not only permitted them to give their summation prior to the prosecution's closing argument, but also gave them the opportunity to make a final rebuttal argument. Defense counsel were able to use the opportunity for rebuttal very effectively, turning much of the prosecutors' closing argument against them by placing many of the prosecutors' comments and actions in a light that was more likely to engender strong disapproval than result in inflamed passions against peti-

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for the second time it expressly agreed with the panel decision on the prosecutorial misconduct issue. 725 F. 2d 1526, 1532 (1984).

The Court of Appeals, however, reversed the District Court on the *Witherspoon* issue. This Court granted the State's petition for certiorari only on that issue, and vacated and remanded the case for reconsideration in light of *Wainwright* v. *Witt*, 469 U. S. 412 (1985). The Court of Appeals denied all relief, 767 F. 2d 752 (1985). During this protracted litigation not one court has agreed with petitioner's claim with respect to improper prosecutorial argument.

tioner.[14] For these reasons, we agree with the District Court below that "Darden's trial was not perfect—few are—but neither was it fundamentally unfair." 513 F. Supp., at 958.[15]

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[14] "Mr. McDaniel made an impassioned plea . . . how many times did he repeat [it]? I wish you had been shot, I wish they had blown his face away. My God, I get the impression he would like to be the man that stands there and pulls the switch on him." Tr. 791; see also *id.*, at 794.

One of Darden's counsel testified at the habeas corpus hearing that he made the tactical decision not to object to the improper comments. Based on his long experience with prosecutor McDaniel, he knew McDaniel would "get much more vehement in his remarks if you allowed him to go on." By not immediately objecting, he hoped to encourage the prosecution to commit reversible error. Supp. App. 46–47.

[15] JUSTICE BLACKMUN's dissenting opinion mistakenly argues that the Court today finds, in essence, that any error was harmless, and then criticizes the Court for not applying the harmless-error standard. *Post,* at 196–197. We do not decide the claim of prosecutorial misconduct on the ground that it was harmless error. In our view of the case, that issue is not presented. Rather, we agree with the holding of every court that has addressed the issue, that the prosecutorial argument, in the context of the facts and circumstances of this case, did not render petitioner's trial unfair—*i. e.*, that it was not constitutional error.

Petitioner also maintains that the comments violated the requirement of reliability in the sentencing process articulated in *Caldwell* v. *Mississippi,* 472 U. S. [illegible]20 (1985). The principles of *Caldwell* are not applicable to this case. *Caldwell* involved comments by a prosecutor during the sentencing phase of trial to the effect that the jury's decision as to life or death was not final, that it would automatically be reviewed by the State Supreme Court, and that the jury should not be made to feel that the entire burden of the defendant's life was on them. This Court held that such comments "presen[t] an intolerable danger that the jury will in fact choose to minimize the importance of its role," a view that would be fundamentally incompatible with the Eighth Amendment requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case. *Id.*, at 333.

There are several factual reasons for distinguishing *Caldwell* from the present case. The comments in *Caldwell* were made at the sentencing phase of trial and were approved by the trial judge. In this case, the comments were made at the guilt-innocence stage of trial, greatly reducing the chance that they had any effect at all on sentencing. The trial judge did

V

Petitioner contends that he was denied effective assistance of counsel at the sentencing phase of trial. That claim must be evaluated against the two-part test announced in *Strickland* v. *Washington*, 466 U. S. 668 (1984). First, petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.*, at 688. Second, petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. Petitioner argues that his trial counsel did not delve sufficiently into his background, and as a result were unprepared to present mitigating evidence at the sentencing hearing.

As an initial matter, petitioner contends that trial counsel devoted only the time between the close of the guilt phase of trial and the start of the penalty phase—approximately one-half hour—to preparing the case in mitigation. That argument is without merit. Defense counsel engaged in extensive preparation prior to trial, in a manner that included preparation for sentencing. Mr. Jack Johnson, head of the Public Defender's office at the time, stated to the habeas court that "we had expended hundreds of hours on [petitioner's] behalf trying to represent him," Tr. of Habeas Corpus Proceedings 219, and that his office "worked very hard on the case." *Id.*, at 237. Mr. Goodwill, an experienced criminal trial lawyer, testified that he "spent more time on this case

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not approve of the comments, and several times instructed the jurors that the arguments were not evidence and that their decision was to be based only on the evidence. But petitioner's reliance on *Caldwell* is even more fundamentally mistaken than these factual differences indicate. *Caldwell* is relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision. In this case, none of the comments could have had the effect of misleading the jury into thinking that it had a reduced role in the sentencing process. If anything, the prosecutors' comments would have had the tendency to *increase* the jury's perception of its role. We therefore find petitioner's Eighth Amendment argument unconvincing.

than I spent on . . . any capital case I have been involved in, probably more time than any case I've ever been involved in." Supp. App. 30. That included time investigating petitioner's alibi, and driving petitioner around the scene of events to establish each point of his story. Counsel obtained a psychiatric report on petitioner, with an eye toward using it in mitigation during sentencing. Counsel also learned in pretrial preparation that Mrs. Turman was opposed to the death penalty, and considered the possibility of putting her on the stand at the sentencing phase. The record clearly indicates that a great deal of time and effort went into the defense of this case; a significant portion of that time was devoted to preparation for sentencing.

Petitioner also claims that his trial counsel interpreted Fla. Stat. § 921.141(6) (1985), a statutory list of mitigating factors, as an exclusive list. He contends that their failure to introduce any evidence in mitigation was the result of this interpretation of the statute, and that he was thereby deprived of effective assistance of counsel. We express no view about the reasonableness of that interpretation of Florida law, because in this case the trial court specifically informed petitioner and his counsel just prior to the sentencing phase of trial that they could "go into any other factors that might really be pertinent to full consideration of your case and the analysis of you and your family situation, your causes, or anything else that might be pertinent to what is the appropriate sentence." Tr. 887. At that point, even if counsel previously believed the list to be exclusive, they knew they were free to offer nonstatutory mitigating evidence, and chose not to do so.

As we recognized in *Strickland:* "Judicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U. S., at 689. In particular, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Ibid.*, quoting *Michel* v. *Louisiana*, 350 U. S. 91, 101 (1955). In this case, there are several reasons why counsel reasonably could have chosen to rely on a simple plea for mercy from petitioner himself. Any attempt to portray petitioner as a nonviolent man would have opened the door for the State to rebut with evidence of petitioner's prior convictions. This evidence had not previously been admitted in evidence, and trial counsel reasonably could have viewed it as particularly damaging. The head of the Public Defenders Office testified at the habeas corpus hearing that petitioner "had been in and out of jails and prisons for most of his adult life . . . ." Tr. of Habeas Corpus Proceedings 209. Petitioner had, for example, previously been convicted of assault with intent to commit rape. *Darden* v. *State*, 218 So. 2d 485 (Fla. App. 1969). In addition, if defense counsel had attempted to offer testimony that petitioner was incapable of committing the crimes at issue here, the State could have responded with a psychiatric report that indicated that petitioner "very well could have committed the crime; that he was, as I recall his [the psychiatrist's] term, sociopathic type personality; that he would act entirely on impulse with no premeditation from the standpoint of planning. But that when a situation arose, the decision would be made simultaneously to commit the act." Supp. App. 76 (testimony of Mr. Goodwill). For that reason, after consultation with petitioner, defense counsel rejected use of the psychiatric testimony. Tr. 886. Similarly, if defense counsel had attempted to put on evidence that petitioner was a family man, they would have been faced with his admission at trial that, although still married, he was spending the weekend furlough with a girlfriend. In sum, petitioner has not "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" 466 U. S., at 689, quoting *Michel* v. *Louisiana*, *supra*, at 101. Petitioner has failed to satisfy the first part of the *Strickland* test, that his trial counsels' performance fell below an objective standard of reasonableness. We agree with both the District Court and the Court of Appeals that petitioner was not deprived of the effective assistance of counsel. 699 F. 2d, at 1037.

VI

The judgment of the Court of Appeals is affirmed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE BURGER, concurring.

I concur fully in the opinion for the Court and write separately only to address the suggestion in JUSTICE BLACKMUN's dissent that the Court rejects Darden's *Witherspoon* claim because of its "impatience with the progress of Darden's constitutional challenges to his conviction." *Post*, at 204. In support of this contention, reference is made to my dissent from the grant of certiorari in this case. The dissent states that I voted to deny the petition because Darden's claims have been reviewed by 95 judges in the 12 years since his conviction. This is simply incorrect. To set the record straight, I quote my dissent in full:

> "In the 12 years since petitioner was convicted of murder and sentenced to death, the issues now raised in the petition for certiorari have been considered by this Court four times, see *Darden* v. *Florida*, 430 U. S. 704 (1977) (dismissing certiorari as improvidently granted); *Darden* v. *Wainwright*, 467 U. S. 1230 (1984) (denying certiorari); *Wainwright* v. *Darden*, 469 U. S. 1202 (1985) (vacating and remanding 725 F. 2d 1526 (CA11 1984)); *Darden* v. *Wainwright*, [473 U. S. 927] (order dated September 3, 1985, denying application for stay), and have been passed upon no fewer than 95 times by federal and

> state court judges. Upon review of the petition and the history of this case, I conclude that no issues are presented that merit plenary review by this Court. Because we abuse our discretion when we accept meritless petitions presenting claims that we rejected only hours ago, I dissent." 473 U. S. 929 (1985).

As my dissent makes clear, I voted to deny the petition in this extraordinary case because the meritless claims raised did not require plenary review. Full briefing and oral argument have not changed my views.

The dissent's suggestion that this Court is motivated by impatience with Darden's constitutional claims is refuted by the record; the 13 years of judicial proceedings in this case manifest substantial care and patience. Our rejection of Darden's claims in this the fourth time he has sought review in this Court is once again based on a thoughtful application of the law to the facts of the case. At some point there must be finality.

JUSTICE BRENNAN, dissenting.

I join my Brother BLACKMUN's dissent. Moreover, adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would vacate the death sentence imposed in this case.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

Although the Constitution guarantees a criminal defendant only "a fair trial [and] not a perfect one," *Lutwak* v. *United States*, 344 U. S. 604, 619 (1953); *Bruton* v. *United States*, 391 U. S. 123, 135 (1968), this Court has stressed repeatedly in the decade since *Gregg* v. *Georgia*, 428 U. S. 153 (1976), that the Eighth Amendment requires a heightened degree of reliability in any case where a State seeks to take the defendant's life.[1] Today's opinion, however, reveals a Court willing to tolerate not only imperfection but a level of fairness and reliability so low it should make conscientious prosecutors cringe.

I

A

The Court's discussion of Darden's claim of prosecutorial misconduct is noteworthy for its omissions. Despite the fact that earlier this Term the Court relied heavily on standards governing the professional responsibility of defense counsel in ruling that an attorney's actions did not deprive his client of any constitutional right, see *Nix* v. *Whiteside*, 475 U. S. 157, 166–171 (1986), today it entirely ignores standards governing the professional responsibility of prosecutors in reaching the conclusion that the summations of Darden's prosecutors did not deprive him of a fair trial. See *ante*, at 178–183.

The prosecutors' remarks in this case reflect behavior as to which "virtually all the sources speak with one voice," *Nix* v. *Whiteside*, *supra*, at 166, that is, a voice of strong condemnation.[2] The following brief comparison of established standards of prosecutorial conduct with the prosecutors' behavior in this case merely illustrates, but hardly exhausts, the scope of the misconduct involved:

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[1] See, *e. g.*, *Caldwell* v. *Mississippi*, 472 U. S. 320, 328–329 (1985); *California* v. *Ramos*, 463 U. S. 992, 998–999 (1983); *Beck* v. *Alabama*, 447 U. S. 625, 637–638 (1980); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion); *Gardner* v. *Florida*, 430 U. S. 349, 358–359 (1977) (plurality opinion); *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion).

[2] Every judge who has addressed the prosecutors' behavior has condemned it. See *Darden* v. *State*, 329 So. 2d 287, 290 (Fla. 1976) ("[T]he prosecutor's remarks under ordinary circumstances would constitute a violation of the Code of Professional Responsibility"); *id.*, at 291–295 (dissenting opinion); *Darden* v. *Wainwright*, 513 F. Supp. 947, 955 (MD Fla. 1981) ("Anyone attempting a text-book illustration of a violation of the Code of Professional Responsibility . . . could not possibly improve upon [prosecutor White's final statement]"); *Darden* v. *Wainwright*, 699 F. 2d 1031, 1035–1036 (CA11 1983); *id.*, at 1040–1043 (dissenting opinion). Even the State's Attorney concedes that prosecutor McDaniel's summation was an "unnecessary tirade," Supp. App. 46, that "[n]o one has ever even weakly suggested that McDaniel's closing remarks were anything but

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improper," Supplemental Answer in *Darden* v. *Wainwright*, Case No. 79–566-Civ. T. H. (MD Fla.) (June 1, 1979), p. 12, and that much of the summation consisted of "inflammatory irrelevancies," Answer to Pet. for Habeas Corpus in *Darden* v. *Wainwright*, Case No. 79–566-Civ. T. H. (MD Fla.) (May 22, 1979), p. 11.

It is true that the Florida Supreme Court, the Federal District Court, and the Court of Appeals each ultimately concluded that Darden had not been deprived of a fair trial. But the grounds on which each rested its conclusion are troubling indeed. The Florida Supreme Court's "careful review of the 'totality of the record,'" as this Court now would describe it, *ante*, at 181, n. 13, consists of three paragraphs. The first of these discusses evidence that petitioner "was a career criminal," who stayed with a woman other than his wife while on furlough, and used her car to visit various bars and a pool hall contrary to the conditions of his furlough. The second paragraph notes, among other things, that petitioner "admitted speeding in a rainstorm and creating great danger to other motorists" on the night of the murder. And the last describes the heinousness of the events that occurred at the Turmans' store, but says absolutely nothing about the evidence tying petitioner to those events. 329 So. 2d, at 290. (The court earlier had noted that Mrs. Turman and Phillip Arnold had identified petitioner as the perpetrator. *Id.*, at 288.)

The crux of the Florida Supreme Court's analysis, however, is that it was not "possible to use language which is fair comment about these crimes without shocking the feelings of any normal person[.] The language used by the prosecutor would have possibly been reversible error if it had been used regarding a less heinous set of crimes. The law permits fair comment. This comment was fair." *Id.*, at 290. Since the prosecutors had "reasonably describ[ed] what happened and what should be done to the guilty party," their comments were not erroneous. *Id.*, at 291.

The standard apparently applied by Florida is wholly unacceptable. A defendant's right to a fair trial cannot depend on the nature of the crime of which he is accused. And "what should be done to the guilty party" cannot be relevant to the determination of guilt.

The District Court's conclusion suffers from a similar error. In addition to advancing many of the arguments adopted by the Court today—none of which is persuasive, see *infra*, at 194–200—the District Court found no prejudice because the offensive statements were not "keyed to arouse prejudice against the accused on any basis other than the horror of the crimes

1. "A lawyer shall not . . . state a personal opinion as to . . . the credibility of a witness . . . or the guilt or innocence of an accused." Model Rules of Professional Conduct, Rule 3.4(e) (1984); see also Code of Professional Responsibility, DR 7-106(C)(4) (1980); ABA Standards for Criminal Justice 3-5.8(b)(2d ed. 1980). Yet one prosecutor, White, stated: "I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life." App. 15. And the other prosecutor, McDaniel, stated, with respect to Darden's testimony: "Well, let me tell you something: If I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out." *Id.*, at 18.

2. "The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the

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themselves." 513 F. Supp., at 956, n. 12. But at the guilt phase of this bifurcated trial, horror about the crimes was irrelevant. The sole issue was whether Darden committed them. The Court of Appeals merely quoted and approved the analysis of the District Court. See 699 F. 2d, at 1036-1037.

In its catalog of the number of judges who have found petitioner's trial to have been fair, the Court fails to include the Magistrate before whom petitioner's federal habeas proceedings were actually conducted, and who recommended that the District Court grant petitioner habeas relief on the basis of his claim of prosecutorial misconduct. Magistrate Paul Game, Jr., correctly recognized that this case essentially turned on the relative credibility of three witnesses, Mrs. Turman, Phillip Arnold, and Willie Darden, and that the prosecutors' concerted attack on Darden's humanity could well have affected the jury's assessment of his credibility. See App. 214. He also recognized that the remarks occurred "[i]n the context of the emotionally charged trial of Darden, a black man, accused of robbery, the brutal murder of a white man, the repeated shooting of a defenseless white teenager and vile sexual advances on a white woman." *Id.*, at 215. Notably, the Court today ignores the context in which the trial took place, including the fact that petitioner's motion for a change of venue was granted, and contents itself instead with hypothesizing reasons why the prosecutors' shameful conduct should not deprive them of a hanging verdict.

evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict." ABA Standards for Criminal Justice 3–5.8(d) (2d ed. 1980); cf. Model Rules of Professional Conduct, Rule 3.4(e); Code of Professional Responsibility, DR 7–106(C)(7); ABA Standards for Criminal Justice 3–6.1(c) (2d ed. 1980). Yet McDaniel's argument was filled with references to Darden's status as a prisoner on furlough who "shouldn't be out of his cell unless he has a leash on him." App. 16; see also, *e. g.*, *id.*, at 17, 18, 23, 24, 26. Again and again, he sought to put on trial an absent "defendant," the State Department of Corrections that had furloughed Darden. See, *e. g.*, *id.*, at 15, 17, 23, 32. He also implied that defense counsel would use improper tricks to deflect the jury from the real issue. See *id.*, at 15, 26. Darden's status as a furloughed prisoner, the release policies of the Department of Corrections, and his counsel's anticipated tactics obviously had no legal relevance to the question the jury was being asked to decide: whether he had committed the robbery and murder at the Turmans' furniture store. Indeed, the State argued before this Court that McDaniel's remarks were harmless precisely *because* he "failed to discuss the issues, the weight of the evidence, or the credibility of the witnesses." Brief for Respondent 26.

3. "The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." ABA Standards for Criminal Justice 3–5.8(c) (2d ed. 1980); see *Berger* v. *United States*, 295 U. S. 78, 88 (1935). Yet McDaniel repeatedly expressed a wish "that I could see [Darden] sitting here with no face, blown away by a shotgun," App. 20; see also, *e. g.*, *id.*, at 28, 29, 31. Indeed, I do not think McDaniel's summation, taken as a whole, can accurately be described as anything but a relentless and single-minded attempt to inflame the jury.

B

The Court, see *ante*, at 181, relies on the standard established in *Donnelly* v. *DeChristoforo*, 416 U. S. 637, 643 (1974), for deciding when a prosecutor's comments at a state trial render that trial fundamentally unfair. It omits, however, any discussion of the facts, so different from those in this case, that led the Court to conclude in *DeChristoforo* that that defendant had not been deprived of a fair trial.

DeChristoforo concerned "two remarks made by the prosecutor during the course of his rather lengthy closing argument to the jury." *Id.*, at 640. One remark was "but one moment of an extended trial." *Id.*, at 645. And even the more objectionable remark was so "ambiguous," *ibid.*, that it provided no basis for inferring either that the prosecutor "intend[ed] [it] to have its most damaging meaning or that a jury, sitting through lengthy exhortation, [would] draw that meaning from the plethora of less damaging interpretations," *id.*, at 647. Finally, the trial judge in *DeChristoforo* expressly instructed the jury to disregard the improper statements. *Id.*, at 645. This Court's holding thus rested on its conclusion that the prosecutor's comments were neither so extensive nor so improper as to violate the Constitution.

Far from involving "ambiguous" statements that "might or might not" affect the jury, *id.*, at 647, the remarks at issue here were "focused, unambiguous, and strong." *Caldwell* v. *Mississippi*, 472 U. S. 320, 340 (1985). It is impossible to read the transcript of McDaniel's summation without seeing it as a calculated and sustained attempt to inflame the jury. Almost every page contains at least one offensive or improper statement; some pages contain little else. The misconduct here was not "slight or confined to a single instance, but . . . was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." *Berger* v. *United States*, 295 U. S., at 89.

C

The Court presents what is, for me, an entirely unpersuasive one-page laundry list of reasons for ignoring this blatant misconduct. First, the Court says that the summations "did not manipulate or misstate the evidence [or] . . . implicate other specific rights of the accused such as the right to counsel or the right to remain silent." *Ante*, at 182. With all respect, that observation is quite beside the point. The "solemn purpose of endeavoring to ascertain the truth . . . is the *sine qua non* of a fair trial," *Estes* v. *Texas*, 381 U. S. 532, 540 (1965), and the summations cut to the very heart of the Due Process Clause by diverting the jury's attention "from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding." *Stone* v. *Powell*, 428 U. S. 465, 490 (1976).

Second, the Court says that "[m]uch of the objectionable content was invited by or was responsive to the opening summation of the defense." *Ante*, at 182, citing *United States* v. *Young*, 470 U. S. 1 (1985). The Court identifies four portions of the defense summation that it thinks somehow "invited" McDaniel's sustained barrage. The State, however, did not object to any of these statements, and, to my mind, none of them is so objectionable that it would have justified a tactical decision to interrupt the defense summation and perhaps irritate the jury. Cf. *id.*, at 13–14.

The Court begins by stating that defense counsel "blamed" the Sheriff's Office for a lack of evidence. *Ante*, at 179. The Court does not identify which, if any, of McDaniel's remarks represented a response to this statement. I cannot believe that the Court is suggesting, for example, that defense counsel's one mention of the "almost crimina[l] neglige[ce] on the part of the Polk County Sheriff's Office," Tr. 728, justified McDaniel's express and repeated wish that he could try the Department of Corrections for murder. See, *e. g.*, App. 15, 17, 23, 32.

Next, the Court notes that defense counsel "alluded" to the death penalty. *Ante*, at 179. While this allusion might have justified McDaniel's statement that "you are merely to determine his innocence or guilt, nothing else," App. 17, it could hardly justify, for example, McDaniel's expressions of his personal wish that Darden be "blown away by a shotgun," *id.*, at 20; see also *id.*, at 28, 29, 31.

Moreover, the Court says, defense counsel twice referred to the perpetrator as an "animal." *Ante*, at 179; see Tr. 717, 732. It is entirely unclear to me why this characterization called for any response from the prosecutor at all. Taken in context, defense counsel's statements did nothing more than tell the jury that, although everyone agreed that a heinous crime had been committed, the issue on which it should focus was whether *Darden* had committed it.

Finally, the Court finds that Darden brought upon himself McDaniel's tirade because defense counsel gave his "personal opinion of the strength of the State's evidence." *Ante*, at 179. Again, the Court gives no explanation of how the statement it quotes—a single, mild expression of defense counsel's overall assessment of the evidence—justified the "response" that followed, which consisted, to the extent it represented a comment on the evidence at all, of accusations of perjury, see App. 18–19, and personal disparagements of opposing counsel, see *id.*, at 15, 26. In sum, McDaniel went so far beyond "respond[ing] substantially in order to 'right the scale,'" *Young*, 470 U. S., at 13, that the reasoning in *Young* provides no basis at all for the Court's holding today.

The third reason the Court gives for discounting the effects of the improper summations is the supposed curative effect of the trial judge's instructions: the judge had instructed the jury that it was to decide the case on the evidence and that the arguments of counsel were not evidence. *Ante*, at 182. But the trial court overruled Darden's objection to McDaniel's repeated expressions of his wish that Darden had been killed, App. 31, thus perhaps leaving the jury with the impression that McDaniel's comments were somehow relevant to the question before them. The trial judge's instruction that the attorneys were "trained in the law," and thus that their "analysis of the issues" could be "extremely helpful," Tr. 714, might also have suggested to the jury that the substance of McDaniel's tirade was pertinent to their deliberations.

Fourth, the Court suggests that because Darden enjoyed the tactical advantage of having the last summation, he was able to "tur[n] much of the prosecutors' closing argument against them." *Ante*, at 182. But the issue before the jury was whether Darden was guilty, not whether McDaniel's summation was proper. And the question before this Court is not whether we agree with defense counsel's criticism of the summation but whether the jury was affected by it. Since Darden was ultimately convicted, it is hard to see what basis the Court has for its naked assertion that "[d]efense counsel were able to use the opportunity for rebuttal very effectively." *Ibid.*; cf. *Young*, 470 U. S., at 18, n. 15 (the defendant's acquittal of the most serious charge "reinforces our conclusion that the prosecutor's remarks did not undermine the jury's ability to view the evidence independently and fairly").

Fifth, the Court finds, in essence, that any error was harmless: "The weight of the evidence against petitioner was heavy; the 'overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges,' 329 So. 2d, at 291, reduced the likelihood that the jury's decision was influenced by argument." *Ante*, at 182. The Court rejects the "no effect" test set out in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), see *ante*, at 183, n. 14, but it does not identify the standard it does use to decide the harmlessness of the error.[3]

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[3] The Court finds *Caldwell* inapposite because the offending comment in *Caldwell* occurred at the sentencing stage of the defendant's trial and misled the jury as to its role in the sentencing process. *Ante*, at 183, n. 14. But *Caldwell*'s Eighth Amendment underpinnings clearly extend to guilt

Every harmless-error standard that this Court has employed, however, shares two salient features. First, once serious error has been identified, the burden shifts to the beneficiary of the error to show that the conviction was not tainted. Second, although different formulations of the harmless-error standard differ in the level of confidence in the outcome required to overcome that burden, the question before a reviewing court is never whether the evidence would have been sufficient to justify conviction, absent an error, but, rather, whether the error undermines its confidence in the outcome of the proceeding to an unacceptable degree. See, *e. g.*, *United States* v. *Young*, 470 U. S., at 20; *Chapman* v. *California*, 386 U. S. 18, 24 (1967); *Kotteakos* v. *United States*, 328 U. S. 750, 765 (1946).

Regardless of which test is used, I simply do not believe the evidence in this case was so overwhelming that this Court can conclude, on the basis of the written record before it, that the jury's verdict was not the product of the prosecutors' misconduct. The three most damaging pieces of evidence—the identifications of Darden by Phillip Arnold and Helen Turman and the ballistics evidence—are all sufficiently problematic that they leave me unconvinced that a jury not exposed to McDaniel's egregious summation would necessarily have convicted Darden.

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determinations in capital cases as well as to sentencing. *Beck* v. *Alabama*, 447 U. S., at 637–638. And under the circumstances of this case, where the sentencing hearing followed immediately upon the jury's return of a guilty verdict and the State's summation consisted of less than a full page of transcript, see Tr. 894, I think the State must have assumed that its attacks on the Department of Corrections and repeatedly expressed wish that Darden die would affect the jury's sentencing decision as well as its determination of guilt. Indeed, the District Court found that the summations during the guilt phase were "in effect [the State's] principal argument in support of the death penalty." 513 F. Supp., at 953, and n. 10. Moreover, I do not see why misleading a jury as to the relevant issues in a capital trial is somehow less pernicious than misleading a jury as to its role.

Arnold first identified Darden in a photo array shown to him in the hospital. The trial court suppressed that out-of-court identification following a long argument concerning the reliability and constitutionality of the procedures by which it was obtained. See Tr. 487–488.[4]

Mrs. Turman's initial identification was made under even more suggestive circumstances. She testified at trial that she was taken to a preliminary hearing at which Darden appeared in order "[t]o identify him." *Id.*, at 215. Instead of being asked to view Darden in a lineup, Mrs. Turman was brought into the courtroom, where Darden apparently was the only black man present. See *id.*, at 220–221. Over defense counsel's objection, after the prosecutor asked her whether "this man sitting here" was "the man that shot your husband," *ibid.*, she identified Darden.[5] Cf. *Moore* v. *Illinois*, 434 U. S. 220, 229–230 (1977).

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[4] Of the six photographs in the array, Arnold immediately rejected four because "[t]hey just didn't fit the description" he had earlier given the police. Tr. 457. Darden's photograph was one of no more than two that identified the subject by name, and under the name on Darden's photograph was the notation "Sheriff's Department, Bartow, Florida" and the date "9/9/73." *Id.*, at 476–477. Arnold was aware at the time of the identification on September 11 that a suspect recently had been arrested. *Id.*, at 459.

[5] Mrs. Turman's identification took place after the following colloquy between the court, the prosecutor (Mr. Mars), and the defense attorney (Mr. Hill):

"THE COURT: Ask her to identify.

"MR. MARS: Yes, sir.

"Q: Can you see this man sitting here?

"MR. HILL: Your Honor, I am going to object to that type of identification.

"THE COURT: I am not. Sit down.

"MR. HILL: Judge—

"THE COURT: Not under these circumstances, Mr. Hill.

"MR. HILL: Judge, even as a defense attorney, that shows no respect in court, much less for the Court, and I—

"THE COURT: I appreciate—

"MR. HILL: And the objection, I want on the record.

The use of showups has long been condemned by this Court, precisely because they can result in unreliable identifications. See, *e. g.*, *Stovall* v. *Denno*, 388 U. S. 293, 302 (1967). Similarly, the Court has condemned the use of photo arrays in which the suspect's photograph "is in some way emphasized." *Simmons* v. *United States*, 390 U. S. 377, 383 (1968). While the question whether the various in- and out-of-court identifications ought to have been suppressed is not now before the Court,[6] my confidence in their reliability is nonetheless undermined by the suggestiveness of the procedures by which they were obtained, particularly in light of Mrs. Turman's earlier difficulties in describing the criminal.

Finally, the ballistics evidence is hardly overwhelming. The purported murder weapon was tied conclusively neither to the crime nor to Darden. Special Agent Cunningham of the Federal Bureau of Investigation's Firearms Identification Unit testified that the bullets recovered at the scene of the crime "could have been fired" from the gun, but he was unwilling to say that they in fact had come from that weapon.

"THE COURT: I appreciate that. It's on the record. This woman has had a traumatic experience and she—

"MR. HILL: Judge, I appreciate that. I still have an obligation to my client.

"THE COURT: I appreciate that. Now if you want to be held in contempt, you pardon me. Alright, go ahead.

"Q: Is this the man that shot your husband?

"A: Yes, sir."

See Pet. for Habeas Corpus in *Darden* v. *Wainwright*, Case No. 79-566-Civ. T. H. (MD Fla.) (May 21, 1979), pp. 18–19; Tr. 218–219.

[6] Challenges to the admissibility of the various identifications were presented in Darden's petition to this Court for direct review of his conviction and sentence. See Brief for Petitioner in *Darden* v. *Florida*, O. T. 1976, No. 76-5382, pp. 2–3 (second and third questions presented raising issues concerning the witnesses' identifications). Although that petition for certiorari was granted, 429 U. S. 917 (1976), the Court later limited its grant to the issue of the prosecutor's closing argument, 429 U. S. 1036 (1977), and ultimately dismissed the writ as improvidently granted, 430 U. S. 704 (1977).

Tr. 347, 357. He also testified, contrary to the Court's a
sertion, that rebored Smith & Wessons were fairly commo
See *id.*, at 350–351, 357–358. Deputy Sheriff Weatherfo
testified that the gun was discovered in a roadside ditch adj
cent to where Darden had wrecked his car on the evening
the crime. But the gun was discovered the next day, *id.*,
503, and the ditch was also next to a bar's parking lot. *Ic*
at 531.

Darden testified at trial on his own behalf and denied a
involvement in the robbery and murder. See *id.*,
571–660. His account of his actions on the day of the crin
was contradicted only by Mrs. Turman's and Arnold's ident
fications. Indeed, a number of the State's witnesses corro
orated parts of Darden's account. The trial judge who ha
seen and heard Darden testify found that he "emotionally an
with what appeared on its face to be sincerity, proclaimed h
innocence." App. 34. In setting sentence, he viewed th
fact that Darden "repeatedly professed his complete inno
cence of the charges" as a mitigating factor. *Id.*, at 35.

Thus, at bottom, this case rests on the jury's determinatio
of the credibility of three witnesses—Helen Turman and Phi
lip Arnold, on the one side, and Willie Darden, on the other
I cannot conclude that McDaniel's sustained assault o
Darden's very humanity did not affect the jury's ability t
judge the credibility question on the real evidence before it
Because I believe that he did not have a trial that was fair,
would reverse Darden's conviction; I would not allow him t
go to his death until he has been convicted at a fair trial.

II

Even if Darden had been convicted fairly, however, I believe his death sentence should be vacated because of the improper exclusion for cause of a member of the venire who wa
qualified to serve under this Court's decisions in *Witherspoon*
v. *Illinois*, 391 U. S. 510 (1968), and *Wainwright* v. *Witt*, 46
U. S. 412 (1985). In *Davis* v. *Georgia*, 429 U. S. 122 (1976),

the Court held that the improper exclusion of one juror renders a death sentence constitutionally infirm *per se.* In Darden's case, the potential prejudice is palpable. Even though it was stripped of members expressing reservations about the death penalty, this jury could not agree unanimously that a death sentence was appropriate. See Tr. 908; 699 F. 2d, at 1041 (dissenting opinion).

Witherspoon concerned an Illinois statute that excused for cause "'any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same.'" 391 U. S., at 512, quoting Ill. Rev. Stat., ch. 38, § 743 (1959). The Court held that the Constitution barred the execution of a defendant sentenced to death by a jury from which such persons had been excluded for cause. That holding rested in large part on the Court's recognition that even some jurors who oppose the death penalty can set aside their personal beliefs and follow the court's instructions to consider whether death is an appropriate penalty. See 391 U. S., at 514–515, n. 7, 515–516, n. 9, 519, 520. As recently as last Term, we held once again that trial courts must distinguish between "prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial." *Witt*, 469 U. S., at 421; see also *id.*, at 422, n. 4; *Adams* v. *Texas*, 448 U. S. 38, 44–45 (1980); *Boulden* v. *Holman*, 394 U. S. 478, 483–484 (1969).

The Court's discussion of Darden's claim rests on a premise that the claim depends entirely on the wording of a single question asked by the trial judge prior to the exclusion of venire member Murphy. See *ante*, at 176. That premise is mistaken. The trial court's error lay in its misunderstanding of the proper standard for exclusion under *Witherspoon.* This misunderstanding influenced both the question the court asked Murphy and its evaluation of his answer. On t record, I cannot say with any assurance that Murphy w properly excluded.

Prior to the *voir dire* of individual venire members, t trial judge announced his intention to excuse, not only a potential juror whose religious or moral principles made h unable to impose the death penalty, but also any potent juror who, if he did follow the court's instructions, "would going against his principles" (emphasis deleted). App. This standard is essentially indistinguishable from the star ard employed by Illinois and expressly disapproved by t Court in *Witherspoon.* If a juror who has reservations abo the wisdom or morality of the death penalty nonetheless f lows the court's instructions, he has *not* been "'prevent[or substantially impair[ed in] the performance of his duties

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[7] In denying Darden's pretrial motion to limit *voir dire* concerning rors' attitudes towards the death penalty, the trial court stated:

"It is my ruling if a prospective juror states on his voir dire examinat that because of his moral, religious or conscientious principles and belief would be unwilling to recommend a death penalty, even though the fa and circumstances meet the requirements of law, then he in effect has s he would be unwilling to follow the law the court shall charge upon it a disregard and be unwilling to follow it or if he did follow it, it would going against his principles, and therefore, I would rule that would be d qualification. If that exists, I intend to disqualify for cause." App. 6 (e phasis deleted).

The Court's statement that "the judge correctly stated the general star ard for dismissal," *ante*, at 177, n. 2, comes immediately on the heels o truncated quotation of the trial judge's ruling which omits the criti phrase, "if he did follow it, it would be going against his principles, a therefore, I would rule that would be disqualification."

The court gave petitioner a continuing objection to its proposed *voir d* questioning. App. 7. Even if this continuing objection were not enou standing alone to preserve petitioner's claim—and the Court does not hold—the statement that "[n]o specific objection was made to the excu of Murphy by defense counsel," *ante*, at 178, is flatly contradicted by t trial transcript. Immediately following Murphy's excusal, the court rected the stenographer to "note the defendant's object to him being cused for cause." Tr. 165.

a juror in accordance with his instructions and his oath,'" *Witt*, 469 U. S., at 424, quoting *Adams*, 448 U. S., at 45. To permit only those individuals who have no reservations about exercising "the truly awesome responsibility of decreeing death for a fellow human," *McGautha* v. *California*, 402 U. S. 183, 208 (1971), to serve on capital juries would surely mark a return to the empaneling of juries "uncommonly willing to condemn a man to die," *Witherspoon*, 391 U. S., at 521.

This case is thus entirely unlike *Witt*. *Witt*'s statement that determinations of juror bias cannot be reduced to a catechism, 469 U. S., at 424, and its reliance on the peculiar ability of trial judges to observe the demeanor and credibility of potential jurors, *id.*, at 428, make sense when there is "every indication that the judge . . . applied the correct standard." *Id.*, at 431. But the record before us today provides no such indication. It is impossible to determine whether the judge's finding of bias reflected a belief that Murphy would be unable to follow the court's instructions or a belief that Murphy would have to set aside his personal beliefs to do so. In fact, Murphy never gave any indication that he could not follow the court's instructions. The burden of proving Murphy's bias rested on the State. *Id.*, at 423–424. The Court's present heavy reliance on "the context surrounding Murphy's exclusion," *ante*, at 176, simply cannot support its conclusion because the trial court's improper interpretation of *Witherspoon* infected that context.

The Court's statement that "the trial court could take account of the fact that Murphy was present throughout an entire series of questions that made the purpose and meaning of the *Witt* inquiry absolutely clear," *ante*, at 178, suffers from a similar defect.[8] I find implausible the Court's assumption that Murphy followed closely the daylong questioning of other jurors. But if that assumption were correct, then the Court should also assume that Murphy anticipated being asked whether his beliefs would prevent or substantially impair performance of his duties as a juror, as other jurors expressing similar sentiments had been asked. That three other jurors, under somewhat more extensive questioning, explicitly stated that *they* did not think *they* could vote for the death penalty, see Tr. 44 (juror Varney); *id.*, at 107 (juror Carn); *id.*, at 109–110 (juror Maher), says nothing about whether *Murphy* shared their inability to put aside personal beliefs and obey his oath as a juror. *Witt* may be right that "many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear,'" 469 U. S., at 424–425; here, however, the judge did not even ask the one question that might have given him real insight into Murphy's ability to serve. The wrong answer is what no question at all begets. Cf. A. Bickel, The Least Dangerous Branch 103 (1962).

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[8] Even to refer to the "*Witt* inquiry" reflects inattention to chronology. This case was tried about a dozen years before *Witt* sought to dispel the "general confusion surrounding the application of *Witherspoon*" under which courts across the country had labored for 15 years. 469 U. S., at 418. How the purpose and meaning of *Witt* could be clear to a layman like

A close reading of the lengthy *voir dire* transcript leads me to conclude that the trial court's behavior is more easily explained by Murphy's appearance in the jury box at the end of a long day of questioning and the desire to finish jury selection expeditiously than by any definite impression on the part of the trial judge that Murphy was unqualified. But neither the trial court's eagerness to get the trial started, nor this Court's impatience with the progress of Darden's constitutional challenges to his conviction and death sentence, see, *e. g.*, 473 U. S. 928, 929 (1985) (BURGER, C. J., dissenting

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Murphy when they were unclear to the judge trying this case and to federal and state appellate courts is nowhere explained. Moreover, from Murphy's perspective, the purpose of the inquiry was to obtain from him truthful answers regarding his background and beliefs. His oath as a juror required him to reveal his strong feelings about the death penalty, even if he believed that he could follow the judge's instructions notwithstanding those feelings.

from the grant of certiorari because 12 years had elapsed since Darden's conviction and sentence and no fewer than "95" judges had reviewed the case),[9] renders Murphy's exclusion justifiable or harmless.

III

Twice during the past year—in *United States* v. *Young,* 470 U. S. 1 (1985), and again today—this Court has been faced with clearly improper prosecutorial misconduct during summations. Each time, the Court has condemned the behavior but affirmed the conviction. Forty years ago, Judge Jerome N. Frank, in dissent, discussed the Second Circuit's similar approach in language we would do well to remember today:

> "This court has several times used vigorous language in denouncing government counsel for such conduct as

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[9] A public dissent from a grant of certiorari is extremely rare. Indeed, I know of no other recent case in which a Justice has dissented on the ground that the claims raised by the petitioner—which at least four Justices must have found worthy of full consideration—were meritless. See also *Ohio ex rel. Eaton* v. *Price,* 360 U. S. 246, 247, n. 1 (1959) (memorandum of BRENNAN, J.) (finding only one instance of such a dissent—the extraordinary case of *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 937 (1952), where certiorari was granted prior to the Court of Appeals' judgment). The concurrence filed by THE CHIEF JUSTICE today, see *ante,* p. 187, to justify his dissent from the grant of certiorari in this case shows why. As JUSTICE BRENNAN persuasively explained in *Price,* a public dissent from a grant of certiorari poses dangers both to the actual workings of the adjudicatory process and to public respect for that process. 360 U. S., at 247–248. By reprinting his dissent in its entirety and emphasizing once again the number of times this Court has been asked to review Darden's claims, THE CHIEF JUSTICE suggests that he irrevocably had committed himself to rejecting those claims before he had received the benefit of the full briefing, oral argument, access to the record, and discussion of the issues by other Members of the Court that followed our grant of certiorari. To me, the fact that this Court has granted certiorari three times is hardly a reason for concluding Darden's claims are meritless, or that the undoubted interest in finality should outweigh our duty to ensure that Darden receives due process.

> that of the [prosecutor] here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. It means actual condonation of counsel's alleged offense, coupled with verbal disapprobation. If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we declared in effect, 'Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules. If prosecutors win verdicts as a result of "disapproved" remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely ceremonial.' Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court—recalling the bitter tear shed by the Walrus as he ate the oysters—breeds a deplorably cynical attitude towards the judiciary" (footnote omitted). *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 661, cert. denied, 329 U. S. 742 (1946).

I believe this Court must do more than wring its hands when a State uses improper legal standards to select juries in capital cases and permits prosecutors to pervert the adversary process. I therefore dissent.

OFFSHORE LOGISTICS, INC., ET AL. *v.* TALLENTIRE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 85-202. Argued February 24, 1986—Decided June 23, 1986

Respondents' husbands were killed when petitioner Air Logistic's helicopter crashed in the high seas 35 miles off the Louisiana coast while transporting the decedents from the offshore drilling platform where they worked to Louisiana. Respondents each filed a wrongful death action (later consolidated) in Federal District Court, raising claims under the Death on the High Seas Act (DOHSA), the Outer Continental Shelf Lands Act (OCSLA), and Louisiana law. Ruling that DOHSA provides the exclusive remedy for death on the high seas, the District Court dismissed respondents' claims based on the Louisiana wrongful death statute. Petitioner Air Logistics having admitted liability, the trial was limited to the question of damages. Because DOHSA limits recovery to "fair and just compensation for . . . pecuniary loss," the court's awards to respondents did not include damages for nonpecuniary losses. The Court of Appeals reversed the District Court's denial of nonpecuniary benefits recoverable under the Louisiana wrongful death statute, holding that state law could apply of its own force by virtue of § 7 of DOHSA, which provides that "[t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected" by the Act. The court concluded, on the basis of § 7's legislative history, that the section was intended to preserve the applicability of state wrongful death statutes on the high seas, and that Louisiana had legislative jurisdiction to extend its wrongful death statute to remedy deaths on the high seas and in fact had intended its statute to have that effect.

Held: Neither OCSLA nor DOHSA requires or permits the application of the Louisiana wrongful death statute in this case so as to entitle respondents to recover nonpecuniary damages under that statute. Pp. 217-233.

(a) Because the fatalities in question did not arise from an accident in the area covered by OCSLA, *i.e.*, "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures" erected thereon, but rather occurred on the high seas, DOHSA, which provides a maritime remedy for wrongful deaths "occurring on the high seas" plainly was intended to control. The character of the decedents as platform workers who had a special relationship with the shore community has no relevance to the resolution of the question of the application of OCSLA to this case. Pp. 217–220.

(b) The language of § 7 of DOHSA and its legislative history, as well as the congressional purposes underlying DOHSA, mandate that § 7 be read not as an endorsement of the application of state wrongful death statutes to the high seas, but rather as a jurisdictional saving clause ensuring that state courts have the right to entertain causes of action and provide wrongful death remedies both for accidents occurring on state territorial waters and, under DOHSA, for accidents occurring on the high seas. Viewed in this light, § 7 serves not to destroy the uniformity of wrongful death remedies on the high seas but to facilitate the efficient and just administration of those remedies. Pp. 220–232.

(c) Once it is determined that § 7 does not sanction the applicability of state wrongful death statutes to accidents on the high seas, it must be concluded that state wrongful death statutes are pre-empted by DOHSA where it applies. Pp. 232–233.

754 F. 2d 1274, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined, and in Part III of which BRENNAN, MARSHALL, POWELL, and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 233.

Keith A. Jones argued the cause for petitioners. With him on the briefs were *J. B. Ruhl* and *Howard Daigle, Jr.*

Charles Hanemann argued the cause for respondents. With him on the brief was *V. Farley Sonnier.**

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Geller, Deputy Assistant Attorney General Willmore,* and *Thomas L. Jones;* and for Sonat Offshore Drilling, Inc., et al. by *E. D. Vickery* and *Gus A. Schill, Jr.*

Briefs of *amici curiae* urging affirmance were filed for the Association of Trial Lawyers of America by *James A. George* and *Peter Perlman;* and for Domengeaux & Wright by *William Rutledge.*

Briefs of *amici curiae* were filed for the Louisiana Trial Lawyers Association by *Drew Ranier;* for the Texas Trial Lawyers Association by *Robert A. Chaffin;* and for Kenneth G. Engerrand, *pro se.*

JUSTICE O'CONNOR delivered the opinion of the Court.

Respondents' husbands were killed when petitioner Air Logistic's helicopter, in which the decedents were traveling, crashed into the high seas. The issue presented is whether the Death on the High Seas Act (DOHSA), 41 Stat. 537, 46 U. S. C. § 761 *et seq.*, provides the exclusive remedy by which respondents may recover against petitioner for the wrongful death of their husbands, or whether they may also recover the measure of damages provided by the Louisiana wrongful death statute, La. Civ. Code Ann., Art. 2315 (West Supp. 1986), applying either of its own force or as surrogate federal law under the Outer Continental Shelf Lands Act (OCSLA), 67 Stat. 462, as amended, 43 U. S. C. § 1331 *et seq.*

I

The husbands of respondents Corrine Taylor and Beth Tallentire worked on drilling platforms in the Gulf of Mexico, off the coast of Louisiana. On August 6, 1980, respondents' husbands were killed while being transported in a helicopter owned and operated by petitioner Air Logistics (hereafter petitioner), a Division of Offshore Logistics, Inc., from a drilling platform to Houma, Louisiana. The crash occurred approximately 35 miles off the coast of Louisiana, well over the 3-mile limit that separates Louisiana's territorial waters from the high seas for purposes of DOHSA.

Respondents each filed wrongful death suits in United States District Court, raising claims under DOHSA, OCSLA, and the law of Louisiana. These actions were later consolidated in the Eastern District of Louisiana. Upon petitioner's pretrial motion for partial summary judgment, the District Court ruled that DOHSA provides the exclusive remedy for death on the high seas, and it therefore dismissed respondents' claims based upon the Louisiana wrongful death statute. Petitioner admitted liability and the trial was limited to the question of damages. Because DOHSA limits recovery to "fair and just compensation for . . . pecuniary loss," the District Court's awards to respondents did not include damages for nonpecuniary losses. 46 U. S. C. § 762.

Respondents appealed the District Court's dismissal of their OCSLA and state law wrongful death claims, contending that they were entitled to nonpecuniary damages under the Louisiana wrongful death statute. See La. Civ. Code Ann., Art. 2315(B) (West Supp. 1986) (permitting recovery for both pecuniary and nonpecuniary damages, "includ[ing] loss of consortium, service, and society"). They argued that the Louisiana statute applied to this helicopter crash on the high seas, either of its own force by virtue of the saving provision in § 7 of DOHSA, 46 U. S. C. § 767, or as adopted federal law through OCSLA. See 43 U. S. C. § 1333(a)(2)(A). The Court of Appeals for the Fifth Circuit reversed the District Court's denial of benefits recoverable under Lousiana law, with one judge specially concurring and another judge dissenting. See 754 F. 2d 1274 (1985).

The Court of Appeals first observed that even if OCSLA did apply to this action, OCSLA adopts state law as surrogate federal law only "[t]o the extent [the state laws] are . . . not inconsistent with . . . other Federal laws." 43 U. S. C. § 1333(a)(2)(A). Because the precedent of the Fifth Circuit held that DOHSA applies to a helicopter crash on the high seas, the court concluded that Louisiana law could not be applied through OCSLA as the Louisiana wrongful death scheme was inconsistent with DOHSA. Accordingly, the court turned to the question whether state law could apply of its own force by virtue of § 7 of DOHSA, which provides:

> "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone." 46 U. S. C. § 767.

After examining the legislative history of § 7, the Court of Appeals concluded that that section was intended to preserve the applicability of state wrongful death statutes on the high seas. It further held that Louisiana had legislative jurisdiction to extend its wrongful death statute to remedy deaths on the high seas and that Louisiana in fact intended its statute to have that effect. In reaching its result, the court acknowledged that the disunity that its decision would create was "profoundly unsettling," 754 F. 2d, at 1284, but ultimately concluded that "[o]ur desire for a uniform, consistent, scheme of maritime death remedies cannot justify a refusal to follow" the perceived legislative will. *Id.*, at 1288.

Judge Jolly filed a special concurrence, observing that although the court's result was compelled by § 7, it would create "significant problems in the field of maritime law because it defies reason, runs contrary to principles of the general precedent in the field, and creates all sorts of internal inconsistencies in the prosecution of cases dealing with death on the high seas." *Id.*, at 1289. Judge Garza dissented, arguing that § 7 was intended to preserve state wrongful death actions only in territorial waters and echoing the view of the Court of Appeals for the Ninth Circuit that the application of state law to wrongful death actions arising on the high seas would be "'as damaging to uniformity in wrongful death actions as it is illogical.'" *Ibid.* (quoting *Nygaard* v. *Peter Pan Seafoods, Inc.*, 701 F. 2d 77, 80 (CA9 1983)).

Because the Fifth Circuit's decision creates the potential for disunity in the administration of wrongful death remedies for causes of action arising from accidents on the high seas and is in conflict with the prevailing view in other courts that DOHSA pre-empts state law wrongful death statutes in the area of its operation, we granted certiorari. 474 U. S. 816 (1985). We now hold that neither OCSLA nor DOHSA requires or permits the application of Louisiana law in this case, and accordingly reverse the judgment of the Court of Appeals for the Fifth Circuit.

II

The tortuous development of the law of wrongful death in the maritime context illustrates the truth of Justice Cardozo's observation that "[d]eath is a composer of strife by the general law of the sea as it was for many centuries by the common law of the land." *Cortes* v. *Baltimore Insular Line, Inc.*, 287 U. S. 367, 371 (1932). In *The Harrisburg*, 119 U. S. 199 (1886), this Court held that in the absence of an applicable state or federal statute, general federal maritime law did not afford a wrongful death cause of action to the survivors of individuals killed on the high seas, or waters navigable from the sea. It reasoned that because the common law did not recognize a civil action for injury which resulted in death on the land, no different rule should apply with respect to maritime deaths. Unable to tolerate this archaism, some courts began to allow recovery for deaths within state territorial waters if an applicable state statute permitted such recovery. See, *e. g.*, *The City of Norwalk*, 55 F. 98, 103–108 (SDNY 1893) (state wrongful death statute may validly be applied to "maritime affairs within the state limits"), aff'd, 61 F. 364, 367–368 (CA2 1894) (application of state wrongful death statute to accident in state territorial waters valid "in the absence of any regulation of the subject by congress"). See also *Steamboat Co.* v. *Chase*, 16 Wall. 522 (1873).

In an attempt to alleviate the harshness of the rule of *The Harrisburg*, this Court also recognized in *The Hamilton*, 207 U. S. 398 (1907), that state wrongful death statutes could, in some limited circumstances, be applied to fatal accidents occurring on the high seas. In *The Hamilton*, the Court held that where the statutes of the United States enabled the owner of a vessel to transfer its liability to a fund and to claim the exclusive jurisdiction of admiralty, and where that fund was being distributed, a Delaware citizen's claim under Delaware law against another citizen of Delaware for wrongful death on the high seas would be recognized in admiralty. The Court noted that "[i]n such circumstances all claims to which the admiralty does not deny existence must be recognized whether admiralty liens or not." *Id.*, at 406.

The Hamilton has sometimes been understood to endorse a broader application of state law on the high seas than its holding suggested. Some courts came to rely on dicta in *The Hamilton* for the "questionable" proposition that if a state wrongful death statute was intended to extend to torts occurring on the high seas, then an action between citizens of that State for a wrongful death on the high seas could lie in admiralty. Day, Maritime Wrongful Death and Survival Recovery: The Need for Legislative Reform, 64 Colum. L. Rev. 648, 650 (1964). See also *Wilson* v. *Transocean Airlines*, 121 F. Supp. 85, 88 (ND Cal. 1954); Comment, 51 Calif. L. Rev. 389 (1963) ("Because the constitutionality of the application of a state wrongful death statute to occurrences on the high seas was doubtful, the cases [recognizing such an application] had to rest on farfetched theories"); Putnam, The Remedy for Death at Sea, 22 Case & Com. 125, 126–127 (1915). There was continued doubt, in spite of *The Hamilton*'s dicta, as to the States' competence to provide wrongful death relief for causes of action arising on the high seas. See *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375, 393, n. 10 (1970) ("The general understanding was that the statutes of the coastal States, which provided remedies for deaths within territorial waters, did not apply beyond state boundaries"); H. R. Rep. No. 674, 66th Cong., 2d Sess., 2, 4 (1920) (accompanying DOHSA) ("there is no right of action for death under" maritime law; "the right to affirmative action [outside of limitation of liability actions] in the admiralty against ship or owner has never been sustained by the Supreme Court").

Even where *The Hamilton* was understood to sanction a state remedy for the high seas, "probably because most state death statutes were not meant to have application to the high seas, [the] possibility [of recovery under state law for deaths on the high seas] did little to fill the vacuum" left by *The Har-*

risburg. *Moragne* v. *States Marine Lines*, *supra*, at 393, n. 10. Moreover, those state wrongful death statutes that were held to apply to the high seas had limited effectiveness because, under the dicta in *The Hamilton*, "[l]egislative jurisdiction to impose a liability for a wrongful act at sea beyond the boundaries of the state had to rest upon one of two theories: either (1) that the vessel upon which the wrongful act occurred was constructively part of the territory of the state; or (2) that the wrongdoer was a vessel or citizen of the state subject to its jurisdiction even when beyond its territorial limits. Neither theory sufficed for every situation." *Wilson* v. *Transocean Airlines*, *supra*, at 88. Such conflict of laws problems arose out of collisions between vessels incorporated in different States and between American-flag vessels and those flying the flag of a foreign jurisdiction that in one celebrated case the perplexed court simply denied recovery entirely. See, *e. g.*, *The Middlesex*, 253 F. 142 (Mass. 1916) (where collision on high seas was between two American vessels whose owners resided or were incorporated in different States, recovery could not be had under any of the potentially applicable state statutes). See also Day, *supra*, at 650–651, and n. 13; Robinson, Wrongful Death in Admiralty and the Conflict of Laws, 36 Colum. L. Rev. 406 (1936). In sum, for all practical purposes, from the date of *The Harrisburg* until the passage of DOHSA in 1920, "there was no remedy for death on the high seas caused by breach of one of the duties imposed by federal maritime law." *Moragne* v. *States Marine Lines, Inc.*, 398 U. S., at 393.

It was in this atmosphere that Congress considered legislation designed to provide a uniform and effective wrongful death remedy for survivors of persons killed on the high seas. See *id.*, at 398, 401; *Wilson* v. *Transocean Airlines*, *supra*, at 88–90. In 1920, Congress enacted DOHSA, in which it finally repudiated the rule of *The Harrisburg* for maritime deaths occurring beyond state territorial waters by providing for a federal maritime remedy for wrongful deaths more than three miles from shore.[1] DOHSA limits the class of beneficiaries to the decedent's "wife, husband, parent, child, or dependent relative," 46 U. S. C. § 761, establishes a 3-year statute of limitations period, § 763a, allows a suit filed by the victim to continue as a wrongful death action if the victim dies of his injuries while suit is pending, § 765, provides that contributory negligence will not bar recovery, § 766, and declares that "recovery . . . shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought. . . . " § 762.

As this Court explained in *Mobil Oil Corp.* v. *Higginbotham*, 436 U. S. 618, 621–622 (1978):

> "In the half century between 1920 and 1970, deaths on the high seas gave rise to federal suits under DOHSA, while those in territorial waters were largely governed by state wrongful-death statutes, [the primary exception being survivor's suits for wrongful death under the Jones Act, which gives a remedy no matter where the wrong takes place.] DOHSA brought a measure of uniformity and predictability to the law on the high seas, but in territorial waters, where *The Harrisburg* made state law the only source of a wrongful-death remedy, the continuing impact of that decision produced uncertainty and incongruity. The reasoning of *The Harrisburg*, which was dubious at best in 1886, became less and less satisfactory as the years passed.
>
> "In 1970, therefore, the Court overruled *The Harrisburg*. In *Moragne* v. *States Marine Lines, Inc.*, 398

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[1] DOHSA does not include a survival provision authorizing recovery for pain and suffering before death. We do not address the issue whether the DOHSA recovery for the beneficiaries' pecuniary loss may be "supplemented" by a recovery for the decedent's pain and suffering before death under the survival provision of some conceivably applicable state statute that is intended to apply on the high seas. See generally *Barbe* v. *Drummond*, 507 F. 2d 794, 797–798 (CA1 1974); *Dugas* v. *National Aircraft Corp.*, 438 F. 2d 1386 (CA3 1971).

> U. S. 375, the Court held that a federal remedy for wrongful death does exist under general maritime law. The case concerned a death in Florida's territorial waters. The defendant argued that Congress, by limiting DOHSA to the high seas, had evidenced an intent to preclude federal judicial remedies in territorial waters. The Court concluded, however, that the reason Congress confined DOHSA to the high seas was to prevent the Act from abrogating, by its own force, the state remedies then available in state waters. *Id.*, at 400." (Footnotes omitted.)

Subsequently, the Court confronted some of the various subsidiary questions concerning the *Moragne* federal death remedy in *Sea-Land Services, Inc.* v. *Gaudet*, 414 U. S. 573 (1974), in which it was held that awards in a *Moragne*-based suit could include compensation for loss of support and services, for funeral expenses, and for loss of society, but not for mental anguish. Finally, in *Higginbotham*, the Court ruled that the nonpecuniary loss standard provided by DOHSA controlled on the high seas, and could not be supplemented by the measure of damages recognized in *Gaudet* for *Moragne* causes of action. In so doing, the Court concluded:

> "We realize that, because Congress has never enacted a comprehensive maritime code, admiralty courts have often been called upon to supplement maritime statutes. The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages . . . . The Act does not address every issue of wrongful-death law . . . but when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." 436 U. S., at 625.

With this background, we now proceed to the question at hand: whether the DOHSA measure of recovery may be supplemented by the remedies provided by state law, through either OCSLA or § 7 of DOHSA.

III

As explained above, DOHSA is intended to provide a maritime remedy for deaths stemming from wrongful acts or omissions "occurring on the high seas." 46 U. S. C. § 761. OCSLA, by contrast, provides an essentially nonmaritime remedy and controls only on "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures" erected thereon. 43 U. S. C. § 1333(a)(2)(A). By its terms, OCSLA must be "construed in such a manner that the character of the waters above the outer Continental Shelf as high seas . . . shall not be affected." § 1332(2). Within the area covered by OCSLA, federal law controls but the law of the adjacent State is adopted as surrogate federal law to the extent that it is not inconsistent with applicable federal laws or regulations. § 1333(a)(2)(A).

The intent behind OCSLA was to treat the artificial structures covered by the Act as upland islands or as federal enclaves within a landlocked State, and not as vessels, for purposes of defining the applicable law because maritime law was deemed inapposite to these fixed structures. See *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U. S. 352, 361–366 (1969). This Court endorsed the congressional assumption that admiralty law generally would not apply to the lands and structures covered by OCSLA in *Rodrigue*, noting that accidents on the artificial islands covered by OCSLA "had no more connection with the ordinary stuff of admiralty than do accidents on piers." *Id.*, at 360. See also *Herb's Welding, Inc.* v. *Gray*, 470 U. S. 414, 422 (1985). Thus, in *Rodrigue*, the Court held that an admiralty action under DOHSA does not apply to accidents "actually occurring" on these artificial islands, and that DOHSA therefore does not preclude the application of state law as adopted federal law through OCSLA to wrongful death actions arising from accidents on offshore platforms. *Rodrigue* v. *Aetna Casualty Co.*, *supra*, at 366.

Respondents argue that because the decedents were platform workers being transported from work to the mainland, OCSLA, not DOHSA, governs their cause of action. They contend that in *Rodrigue* and *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473 (1981), the Court recognized the applicability of state law through OCSLA to accidents that resulted in deaths or injuries not on platforms, but on boats in the waters immediately adjacent to the platforms. This, they state, evidences the Court's assumption that OCSLA applies to traditionally maritime locales on the high seas, beyond the confines of the platform, when the decedent is a platform worker. In support of their apparent assumption that it is the decedent's status as a platform worker that controls, they note that it was the "special relationship between the men working on these artificial islands and the adjacent shore to which they commute to visit their families" that moved Congress to treat drilling platforms as upland federal enclaves rather than vessels. *Rodrigue* v. *Aetna Casualty Co.*, 395 U. S., at 365.

We cannot accept respondents' attempt to rewrite OCSLA. The extension of OCSLA far beyond its intended locale to the accident in this case simply cannot be reconciled with either the narrowly circumscribed area defined by the statute or the statutory prescription that the Act not be construed to affect the high seas which cover the Continental Shelf. Nor can the extension of OCSLA to this case be reconciled with the operative assumption underlying the statute: that admiralty jurisdiction generally should not be extended to accidents in areas covered by OCSLA. See, *e. g.*, *id.*, at 361. Here, admiralty jurisdiction is expressly provided under DOHSA because the accidental deaths occurred beyond a marine league from shore. See 46 U. S. C. § 761. Even without this statutory provision, admiralty jurisdiction is appropriately invoked here under traditional principles because the accident occurred on the high seas and in furtherance of an activity bearing a significant relationship to a traditional maritime activity. See *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U. S. 249 (1972). Although the decedents were killed while riding in a helicopter and not a more traditional maritime conveyance, that helicopter was engaged in a function traditionally performed by waterborne vessels: the ferrying of passengers from an "island," albeit an artificial one, to the shore. *Id.*, at 271, and n. 20.

The character of the decedents as platform workers who have a special relationship with the shore community simply has no special relevance to the resolution of the question of the application of OCSLA to this case. Neither of the cases cited by respondents supports their position. *Rodrigue* and *Gulf Offshore* did not endorse the proposition that it is the decedent's status or his special relationship with the shore that required the application of OCSLA, regardless of the location of the accident. Indeed, no question was even raised in *Gulf Offshore* regarding whether OCSLA applied to an accident aboard a vessel adjacent to the platform. Moreover, the facts of these cases make clear that OCSLA was presumed applicable not because of the status of the decedents but because of the proximity of the workers' accidents to the platforms and the fact that the fatalities were intimately connected with the decedents' work on the platforms.

We do not interpret §4 of OCSLA, 43 U. S. C. §1333, to require or permit us to extend the coverage of the statute to the platform workers in this case who were killed miles away from the platform and on the high seas simply because they were platform workers. Congress determined that the general scope of OCSLA's coverage, like the operation of DOHSA's remedies, would be determined principally by locale, not by the status of the individual injured or killed.[2]

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[2] Only one provision of OCSLA superimposes a status requirement on the otherwise determinative OCSLA situs requirement; § 1333(b) makes compensation for the death or injury of an "employee" resulting from cer-

See 43 U. S. C. § 1333(a)(2)(A) ("To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations . . . , the civil and criminal laws of each adjacent State . . . are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon"); 46 U. S. C. § 761 (DOHSA's coverage extends to the death of any "person . . . caused by wrongful act, neglect, or default occurring on the high seas beyond a maritime league from the shore of any State . . ."). Cf. *Herb's Welding, Inc.* v. *Gray*, *supra* (discussing status and situs requirements of the Longshoremen's and Harbor Workers' Compensation Act as applied to platform workers making claims against their employers); *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates*, 459 U. S. 297 (1983); 46 U. S. C. § 688 (recovery under Jones Act confined to "seaman"). Because the fatalities underlying this suit did not arise from an accident in the area covered by OCSLA but rather occurred on the high seas, DOHSA plainly was intended to control.

In the circumstances presented, then, the conclusion is inescapable that the remedies afforded by DOHSA, not OCSLA, govern this action. Thus, respondents may secure the nonpecuniary damages made available by Louisiana's wrongful death statute only if it is found that DOHSA preserves, or does not pre-empt, state remedies on the high seas.

IV

Respondents argue that the first sentence of § 7 of DOHSA was intended to ensure the applicability of state wrongful death statutes to deaths on the high seas. We conclude that that provision will not bear respondents' reading when evalu-

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tain operations on the Outer Continental Shelf payable under the Longshoremen's and Harbor Workers' Compensation Act. We note that because this case does not involve a suit by an injured employee against his employer pursuant to § 1333(b), this provision has no bearing on this case.

ated in light of the language of the Act as a whole, the legislative history of § 7, the congressional purposes underlying the Act, and the importance of uniformity of admiralty law. See *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, 285 (1956) ("'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy'") (quoting *United States* v. *Heirs of Boisdoré*, 8 How. 113, 122 (1849)). These references persuade us that the first sentence of § 7 was intended only to serve as a jurisdictional saving clause, ensuring that state courts enjoyed the right to entertain causes of action and provide wrongful death remedies both for accidents arising on territorial waters and, under DOHSA, for accidents occurring more than one marine league from shore.

The first sentence of § 7 of DOHSA, as originally drafted, provided that "the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this act as to causes of action accruing within the territorial limits of any State." See 59 Cong. Rec. 4482 (1920). During the House debate, Representative Mann proposed an amendment deleting the words "as to causes of action accruing within the territorial limits of any state." Although at first blush the language of the amended § 7 seems to support respondents' position, a closer comparison of the language of § 7, both before and after its amendment, with the language of § 4 of the Act belies respondents' facial argument.

The only other amendment made to the bill as originally submitted was the addition of § 4, which provides:

> "Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is

> authorized, any statute of the United States to the contrary notwithstanding." 46 U. S. C. § 764.

Section 4 indicates that when Congress wanted to preserve the right to recover under the law of another sovereign for whatever measure of damages that law might provide, regardless of any inconsistency with the measure of damages provided by DOHSA, it did so expressly. We are reluctant to read the much more ambiguous language of § 7, which states only that state law "remedies" or "rights of action" would not be "affected" and which makes no provision for reconciling potentially conflicting state and federal measures of recovery, to have the same substantive effect as the explicit command of § 4. Normal principles of statutory construction require that we give effect to the subtleties of language that Congress chose to employ, particularly where, as here, Congress isolated only these sections for special consideration by way of amendment while it was considering DOHSA.

The language of § 7 bears a marked similarity to the "saving to suitors" clause that allows litigants to bring *in personam* maritime actions in state courts. See Judiciary Act of 1789, § 9, 1 Stat. 76 ("saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it"); 28 U. S. C. § 1333 (1948 and 1949 amendments to original saving clause) ("saving to suitors in all cases all other remedies to which they are otherwise entitled"). See also *Madruga* v. *Superior Court*, 346 U. S. 556, 560, n. 12 (1954) (1948 and 1949 amendments effected no substantive change). The "saving to suitors" clause leaves state courts competent to adjudicate maritime causes of action in proceedings *in personam* and means that "a state, 'having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit' so long as it does not attempt to [give *in rem* remedies or] make changes in the 'substantive maritime law.'" *Id.*, at 560–561 (quoting *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 124 (1924)). Stated another way, the "saving to suitors" clause allows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called "reverse-*Erie*" doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards. Baxter, Choice of Law and the Federal System, 16 Stan. L. Rev. 1, 34 (1963) (referring to *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938)). See also *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 245 (1942); Stevens, Erie RR. v. Tompkins and the Uniform General Maritime Law, 64 Harv. L. Rev. 246 (1950).

Thus, a natural reading of § 7 is that a state statute providing a wrongful death right of action traditionally unavailable at common law would not be "affected" by DOHSA in the sense of being rendered an incompetent means of invoking state jurisdiction, but the state statute's substantive provisions would not, by virtue of the saving provision, "extend as a conduct-governing enactment on the high seas" if in conflict with DOHSA's provisions. *Safir* v. *Compagnie Generale Transatlantique*, 241 F. Supp. 501, 508 (EDNY 1965) (interpreting § 7). The legislative history of § 7, as originally proposed and as amended, supports this construction of the section's language.

The Maritime Law Association (MLA), an organization of experts in admiralty law and a prime force in the movement for a federal wrongful death remedy, drafted the bill that was enacted as DOHSA. The MLA envisioned § 7 to be a jurisdictional saving clause which completed the statutory scheme by ensuring continued concurrent state and federal jurisdiction over wrongful death claims arising from accidents on territorial waters. See, *e. g.*, American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts § 1316(b), pp. 236–237 (1969) (hereinafter ALI Study). See also Hughes, Death Actions in Admiralty, 31 Yale L. J. 115, 123 (1921). Although congressional proponents viewed § 7 as a product of perhaps overabundant caution, the MLA, an expert body of maritime lawyers, had reason to fear that absent a saving clause specifically recognizing the continued viability of this type of action, state wrongful death remedies on territorial waters might be deemed beyond the competency of state courts. In 1917, this Court handed down *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, a landmark in admiralty law. In that case the Court held that the remedy a state workmen's compensation statute "attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction" where the rights and liabilities of the parties are clearly matters within admiralty jurisdiction. *Id.*, at 218. The felt necessity for a DOHSA saving clause, then, may be traced to the fact that wrongful death statutes, like workmen's compensation schemes, were not "common law remedies," see *The Harrisburg*, 119 U. S., at 213, and thus may not have been deemed "saved to suitors" under the Judiciary Act of 1789, as construed in *Jensen*.

Although not intended to function as a substantive law saving clause, § 7 incidentally ensured that state courts exercising concurrent jurisdiction could, as under the "saving to suitors" clause, apply such state remedies as were not inconsistent with substantive federal maritime law. It had been recognized that States could "modify" or "supplement" the federal maritime law by providing a wrongful death remedy enforceable in admiralty for accidents on territorial waters. See, *e. g.*, *Western Fuel Co.* v. *Garcia*, 257 U. S. 233 (1921); *Steamboat Co.* v. *Chase*, 16 Wall. 522 (1873). The reach of DOHSA's substantive provisions was explicitly limited to actions arising from accidents on the high seas, see 46 U. S. C. § 761, so as to "prevent the Act from abrogating by its own force, the state remedies then available in state waters." *Mobil Oil Corp.* v. *Higginbotham*, 436 U. S., at 621–622. Thus, because DOHSA by its terms extended only to the high seas and therefore was thought not to displace these state remedies on territorial waters, see *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375 (1970), § 7, as originally proposed, ensured that the Act saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court.

Although the congressional debates on § 7 were exceedingly confused and often ill informed, the remarks of the proponents of the bill amply support the theory that § 7 originally was intended to preserve the state courts' jurisdiction to provide wrongful death remedies under state law for fatalities on territorial waters. In the debate, the discussion focused almost exclusively on the intended jurisdictional effects of that section. See 59 Cong. Rec. 4482–4485 (1920). The proponents of § 7 before its amendment expressed their resolve to save to suitors the benefits of state judicial, and, derivatively, legislative jurisdiction within state territorial waters. See, *e. g.*, *id.*, at 4482 (remarks of Rep. Volstead); *id.*, at 4483 (remarks of Rep. Montague) ("[T]he territorial waters of the States shall be retained within the jurisdiction and sovereignty of the States and their courts"); *ibid.* (remarks of Rep. Montague) (§ 7, as originally drafted, was "put in out of abundant caution, to calm the minds of those who think that rights within the territorial waters will be usurped by the national law"). They also, however, stated their firm intent to make exclusive federal jurisdiction over wrongful death actions arising on the high seas by restricting the scope of § 7 to territorial waters. See, *e. g.*, *ibid.* (remarks of Rep. Moore) ("The purpose . . . is to give exclusive jurisdiction to the admiralty courts where the accident occurs on the high seas"). Thus, they asserted that the effect of § 7, as originally drafted, would be to confer exclusive jurisdiction on the federal admiralty courts for causes of action arising on the high seas. See, *e. g.*, *ibid.* (remarks of Rep. Sanders); *id.*, at 4484 (remarks of Rep. Volstead) ("This bill clearly leaves the jurisdiction exclusive in the Federal court outside the 3-mile limit").

It is against this backdrop that Representative Mann introduced his amendment to § 7. To the extent that Representative Mann's specific intent in introducing his amendment can be deciphered from his contribution to the debate's confusion, his purpose appears at least consistent with the idea that § 7 would serve as a jurisdictional saving clause, as his principal concern seems to have been the recognition of state court jurisdiction over DOHSA claims. Representative Mann had, in debates over an earlier draft of DOHSA, expressed his belief that federal admiralty courts had exclusive jurisdiction over accidents occurring on the high seas. See 51 Cong. Rec. 1928 (1914). In those debates, his principal concern was that state courts would continue to enjoy concurrent jurisdiction with federal admiralty courts over causes of action arising on the Great Lakes. *Ibid.* During the debates on the bill that became DOHSA, Representative Mann continued to express his concern regarding the jurisdiction of state courts over death claims growing out of accidents on territorial waters and the Great Lakes. See, *e. g.*, 59 Cong. Rec. 4483 (1920). However, he also argued in these later debates that if state courts had ever previously exercised jurisdiction over death claims arising on the high seas, they should be permitted to continue to do so. See, *e. g.*, *ibid.* ("Though I do not know, I suppose if a man is injured on the high seas . . . and he can get service on the defendant, as a result of that injury, he can bring suit"); *id.*, at 4484 ("I remember this bill very distinctly in previous Congresses, and . . . I was under the impression that the bill was not intended to take away any jurisdiction which can now be exercised by any State court"); *ibid.* ("If this act as originally drawn by the admiralty lawyers was intended for the purpose of taking away jurisdiction now conferred by State statutes, it ought to be critically examined"). By suggesting the deletion of the language limiting the jurisdictional saving clause's scope only to territorial waters, Representative Mann intended to ensure that state courts could also serve as a forum for the adjudication of wrongful death actions arising out of accidents on the high seas. See, *e. g.*, *ibid.* (under Rep. Mann's amendment, where a State gives a cause of action and a death occurred on the high seas, "there would be concurrent jurisdiction"); *id.*, at 4485 (If § 7 were amended as he suggested, "the act will not take away any jurisdiction conferred now by the States").

We conclude that Representative Mann's amendment extended the jurisdictional saving clause to the high seas but in doing so, it did not implicitly sanction the operation of state wrongful death statutes on the high seas in the same manner as the saving clause did in territorial waters. Under the prevailing "uniformity" doctrine expressed most forcefully in *Southern Pacific Co.* v. *Jensen*, 244 U. S., at 215–216, to the extent Congress provided a federal remedy for wrongful death on the high seas, the federal substantive law would clearly have pre-empted conflicting state wrongful death statutes, as was recognized by various Members during the debates on DOHSA. See, *e. g.*, 59 Cong. Rec. 4485 (1920) (remarks of Rep. Volstead) ("[T]he power to pass laws on this subject is conferred on Congress in the Constitution, and whenever Congress acts I have no doubt it excludes the power on the part of the State to pass laws on the same subject"); *id.*, at 4486 (remarks of Rep. Goodykoontz). Admiralty courts would, of course, apply federal maritime law in adjudicating such claims and, as was noted in the congressional debates at the time of DOHSA's passage, state and federal courts exercising jurisdiction under the "saving to suitors" clause over maritime claims for deaths on the high seas were obliged to apply governing federal substantive law in resolving those claims to the extent state common law remedies conflicted with governing federal maritime law. See *Chelentis* v. *Luckenbach S.S. Co.*, 247 U. S. 372, 384 (1918) ("Plainly, . . . under the saving [to suitors] clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law . . . . [W]ithout regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea"); *Southern Pacific Co.* v. *Jensen*, *supra*. Cf. *Workman* v. *New York City*, 179 U. S. 552 (1900). No reasonable doubt could be entertained of the displacement of state remedies for deaths occurring on the high seas because the conflicting federal standard was not derived just from general federal maritime law; it was explicitly provided for by federal legislation directly on point. See *Southern Pacific Co.* v. *Jensen*, *supra*, at 216 ("[N]o [state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress"). See also *Garrett* v. *Moore-McCormack Co.*, 317 U. S., at 245; *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 411 (1953).

Although Representative Mann's discussion may reflect a broader intent, we believe his references to state court jurisdiction should be read to mean only the ability of state courts to entertain maritime actions based on DOHSA, not the legislative ability to supply a different standard of recovery. As has been explained, even at the time that DOHSA was being considered it was understood that where Congress had spoken, or where general federal maritime law controlled, the States exercising concurrent jurisdiction over maritime matters could not apply conflicting state substantive law. See *Chelentis* v. *Luckenbach S.S. Co.*, *supra; Southern Pacific Co.* v. *Jensen*, *supra*. See also *Cannon* v. *University of Chicago*, 441 U. S. 677, 696–697 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law"). Indeed, while the reference is somewhat unclear, Representative Mann at least once in the debate seemed to have recognized that, where Congress passed a law, that law would control, exclusively of state law, in the area of its operation. See 59 Cong. Rec. 4484 (1920) (exchange between Reps. Igoe and Mann).

Finally, we note that under the *Jensen* and *Chelentis* cases, there was a fair doubt whether Congress could constitutionally require the application of state statutory remedies to maritime injuries. Just one year after DOHSA was passed, the Court invalidated a congressional attempt to override the result in *Jensen* by authorizing the application of state workers' compensation statutes to maritime injuries, ruling that Congress could not delegate to the States the ability to prescribe rules governing maritime injuries that "would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established." *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 164 (1920). See *Wilson* v. *Transocean Airlines*, 121 F. Supp., at 90–91. Given this legal climate and the congressional recognition of that climate, we must infer that if Representative Mann and his colleagues intended affirmatively to require enforcement of state substantive law on the high seas, they would have taken care to make that requirement explicit. The language of § 7, when read in light of § 4, does not provide an unambiguous guide. And certainly the debates surrounding § 7's amendment do not indicate with any degree of clarity a congressional intent to save state substantive law on the high seas. In fact, immediately before the amendment went to a vote, Representative Goodykoontz cautioned that the amendment would simply "leave the [first] sentence [of § 7] incomplete and the remaining language, not unlike Mahomet's coffin, suspended between heaven and earth, having no application to anything in particular." 59 Cong. Rec., at 4486. The ambiguous language of the proposed amendment went to a vote without clarification, despite Representative Goodykoontz' explicit warning during the final moments of the debate that the amendment would at best be "surplusage" with no meaning, and at worst would destroy the object of § 7 as originally framed because, under the "decisions of the Supreme Court," the incomplete sentence would not be effective to save the state jurisdiction in territorial waters from being "superseded by the exclusive power and authority of the admiralty courts." *Ibid.*

In sum, we believe that our reading of § 7, while not free from doubt, gives the proper meaning to the language of that section, is supported by its legislative history, and is consistent with the law governing at the time of its passage. It is also in accord with the general congressional purpose behind the enactment of DOHSA. As we have previously recognized, Congress acted in 1920 to remedy "[t]he void that existed in maritime law up until 1920[:] the absence of any remedy for wrongful death on the high seas," and to achieve uniformity in the provision of such a remedy. *Moragne* v. *States Marine Lines, Inc.*, 398 U. S., at 398, 401. See also *supra*, at 214–215. To read § 7 as intended to preserve intact largely nonexistent or ineffective state law remedies for wrongful death on the high seas would, of course, be incongruous. Just as incongruous is the idea that a Congress seeking uniformity in maritime law would intend to allow widely divergent state law wrongful death statutes to be applied on the high seas. See, *e. g.*, Putnam, The Remedy for Death at Sea, 22 Case & Com., at 125–127 (use of state wrongful death statutes "leaves the courts obliged to struggle with state statutes quite divergent in their terms, so that the resulting congeries of modes of remedy on navigable waters show a striking intricacy, leading to marked inefficiency"). See also *Mobil Oil Corp.* v. *Higginbotham*, 436 U. S., at 625 ("Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements," citing as authority *Wilson* v. *Transocean Airlines*, *supra* (§ 7 does not preserve the operation of state wrongful death statutes on the high seas)). Indeed, it is hardly conceivable that Congress could have intended that these diverse state statutes could be applied to remedy maritime torts occurring the world over. A majority of courts and commentators that have addressed this issue in the 66 years since the passage of DOHSA have rejected such an illogical interpretation of § 7's intended effect.[3] Many courts and commentators have adopted our construction of § 7 as the only means by which the statutory scheme can be read coherently. See, *e. g., Safir* v. *Compagnie Generale Transatlantique*, 241 F. Supp., at 501; *Ledet* v. *United Aircraft Corp.*, 10 N. Y. 2d 258, 176 N. E. 2d 820 (1961); ALI Study § 1316(b), at 236–237. Cf. *Moragne* v. *States Marine Lines, Inc., supra*, at 400, n. 14 (§ 1 of DOHSA does not place exclusive jurisdiction on the admiralty side of the federal courts for suits under the Act); *Rairigh* v. *Erlbeck*, 488 F. Supp. 865 (Md. 1980).

In sum, the language of § 7 and its legislative history, as well as the congressional purposes underlying DOHSA, mandate that § 7 be read not as an endorsement of the application of state wrongful death statutes to the high seas, but rather as a jurisdictional saving clause. Viewed in this light, § 7 serves not to destroy the uniformity of wrongful death remedies on the high seas but to facilitate the effective and just administration of those remedies. The recognition of concurrent state jurisdiction to hear DOHSA actions makes available to DOHSA beneficiaries a convenient forum for the decision of their wrongful death claims. See Note, Admiralty: Death on the High Seas by Wrongful Act, 47 Cornell L. Q. 632, 638 (1962) (hereinafter Note). Because the resolution of DOHSA claims does not normally require the expertise that admiralty courts bring to bear, DOHSA actions are clearly within the competence of state courts to adjudicate. See ALI Study, at 237; Note, at 637. Also, the availability of concurrent jurisdiction prevents disunity in the provision of forums to survivors of those killed on the high seas; it ensures that if a seaman and a passenger are killed at sea in the same accident, the beneficiaries of both are able to choose the forum in which they prefer to proceed. See *Engel* v. *Davenport*, 271 U. S. 33 (1926) (state and federal courts have concurrent jurisdiction over Jones Act claims). See also ALI Study § 1316(b), at 237; Note, at 638. Cf. also *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473 (1981) (recognizing state courts' concurrent jurisdiction over OCSLA claims).

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[3] See, *e. g., Jennings* v. *Goodyear Aircraft Corp.*, 227 F. Supp. 246, 248 (Del. 1964); *Wilson* v. *Transocean Airlines*, 121 F. Supp. 85, 99 (ND Cal. 1954); *Echavarria* v. *Atlantic & Caribbean Steam Nav. Co.*, 10 F. Supp. 677, 678 (EDNY 1935); Robinson, Wrongful Death in Admiralty and the Conflict of Laws, 36 Colum. L. Rev. 406, 410, n. 19 (1936); Magruder & Grout, Wrongful Death within the Admiralty Jurisdiction, 35 Yale L. J. 395, 416, 422–423 (1926). See also, *e. g., Nygaard* v. *Peter Pan Seafoods, Inc.*, 701 F. 2d 77 (CA9 1983) (finding state statutes pre-empted by exclusive DOHSA remedy); *Barbe* v. *Drummond*, 507 F. 2d, at 801, n. 10; *Dugas* v. *National Aircraft Corp.*, 438 F. 2d, at 1388; *Lockwood* v. *Astronautics Flying Club, Inc.*, 437 F. 2d 437, 438 (CA5 1971); *Middleton* v. *Luckenbach S.S. Co.*, 70 F. 2d 326, 329 (CA2 1934); G. Gilmore & C. Black, Law of Admiralty 364 (2d ed. 1975); D. Robertson, Admiralty and Federalism 224 (1970); 1 E. Benedict, Law of Admiralty §§ 143, 148, pp. 385–386, 394, and n. 57 (6th ed. 1940); Day, Maritime Wrongful Death and Survival Recovery: The Need for Legislative Reform, 64 Colum. L. Rev. 648, 651 (1964); Hughes, Death Actions in Admiralty, 31 Yale L. J. 115, 122–123 (1921); Note, Maritime Wrongful Death After *Moragne:* The Seaman's Legal Lifeboat, 59 Geo. L. J. 1411, 1417 (1971); Note, The Tangled Seine: A Survey of Maritime Personal Injury Remedies, 57 Yale L. J. 243 (1947). Cf. *Sea-Land Services, Inc.* v. *Gaudet*, 414 U. S. 573, 588, and n. 22 (1974) (discussing availability of certain elements of damages on territorial waters under federal maritime law on the clear assumption that state damages remedies not available on high seas). But see *Alexander* v. *United Technologies Corp.*, 548 F. Supp. 139, 142–143 (Conn. 1982); *In re Complaint of Exxon Corp.*, 548 F. Supp. 977, 978 (SDNY 1982).

Once it is determined that § 7 acts as a jurisdictional saving clause, and not as a guarantee of the applicability of state substantive law to wrongful deaths on the high seas, the conclusion that the state statutes are pre-empted by DOHSA where it applies is inevitable. As we held in *Higginbotham*, Congress has "struck the balance for us" in determining that survivors should be restricted to the recovery of their pecuniary losses, and when DOHSA "does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." 436 U. S., at 625.

Admittedly, in the circumstances of this case, the recognition of a state damages remedy for loss of society would bring respondents' DOHSA recovery into line with the damages available to a beneficiary of a federal *Moragne* maritime cause of action arising from a death on territorial waters. See *Sea-Land Services, Inc.* v. *Gaudet*, 414 U. S. 573 (1974) (holding that awards under the general federal maritime cause of action for wrongful death could include compensation for loss of society). However, the questionable practical significance of this difference in recovery, see *Mobil Oil Corp.* v. *Higginbotham, supra*, at 624, and n. 20, is far overshadowed by the potential for serious conflicts between DOHSA and state substantive law in such areas as limitations periods, classes of beneficiaries, and the definition of potential defenses. We defer to Congress' purpose in making a uniform provision for recovery for wrongful deaths on the high seas, an area where the federal interests are primary.

The judgment of the Court of Appeals for the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, concurring in part and dissenting in part.

The Court today holds that § 7 of the Death on the High Seas Act (DOHSA), 41 Stat. 538, 46 U. S. C. § 767, forecloses application of state remedies for wrongful deaths on the high seas. Thus, the Court confines state courts to the adjudication of causes of action brought under DOHSA. Because I believe that the Court's reading of § 7 is at odds with the language of the statute and its legislative history, I dissent.[1]

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[1] I agree with the Court's conclusion that the Outer Continental Shelf Lands Act, 67 Stat. 462, as amended, 43 U. S. C. § 1331 *et seq.*, does not govern this action, and therefore join Part III of the Court's opinion.

I

In the early judicial history of the United States, a few courts of admiralty, moved by humanitarian considerations, found in general maritime law a right of action for wrongful death. As Chief Justice Chase noted in an often-quoted passage: "[C]ertainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." *The Sea Gull*, 21 F. Cas. 909, 910 (No. 12,578) (CC Md. 1865). See *The Highland Light*, 12 F. Cas. 138, 139 (No. 6,477) (CC Md. 1867) ("The admiralty may be styled, not improperly, the human providence which watches over the rights and interests of those 'who go down to the sea in ships'"). In 1886, however, this Court in *The Harrisburg*, 119 U. S. 199, held that such a right of recovery was not provided by general maritime law, but instead must be created by a state or federal statute.[2]

At the time of *The Harrisburg*, no federal statute afforded a right of action for wrongful death at sea. See *id.*, at 213. Many States, including Louisiana, had statutes that granted a right of action for wrongful death generally, and lower federal courts had begun to enforce such rights in admiralty.[3]

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[2] The Court stated:

"The argument everywhere in support of [wrongful death] suits in admiralty has been, not that the maritime law, as actually administered in common law countries, is different from the common law in this particular, but that the common law is not founded on good reason, and is contrary to 'natural equity and the general principles of law.' Since, however, it is now established that in the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law." 119 U. S., at 213.

[3] See cases cited in 754 F. 2d 1274, 1277, n. 1 (CA5 1985).

In 1907, the Court confirmed the power of a State to provide a right of action for wrongful death upon the high seas. *The Hamilton,* 207 U. S. 398. This power, however, created jurisdictional fictions and serious problems in choice of law that sometimes denied recovery altogether. See *Wilson* v. *Transocean Airlines,* 121 F. Supp. 85, 88–89 (ND Cal. 1954).

As a result, from 1898 to 1917 legislators in Congress introduced several bills that would have provided an exclusive federal right of action for wrongful death on all navigable waters. *Id.,* at 89, nn. 8 and 9. These proposals met with an unbroken string of defeats, primarily because of considerable local opposition to any federal displacement of the operation of state wrongful-death statutes on territorial waters. *Ibid.* Finally, in the predecessor of § 7 of DOHSA, proposed legislation provided a uniform federal right of action for death on the high seas, and left unaffected the operation of state statutes on territorial waters. S. 4288, 64th Cong., 1st Sess. (1916); H. R. 9919, 64th Cong., 1st Sess. (1916). The bill was favorably reported by both Houses. S. Rep. No. 741, 64th Cong., 1st Sess. (1916); H. R. Rep. No. 1419, 64th Cong., 2d Sess. (1917). The same bill was introduced again in the House on the opening day of the 65th Congress. H. R. 39, 65th Cong., 1st Sess. (1917). Congress took no action on that bill, presumably because the United States entered World War I four days later.

Following World War I, the bill was reintroduced in the 66th Congress. S. 2085, 66th Cong., 1st Sess. (1919). The Senate passed the bill without material amendment. As it then stood, the bill provided in § 1 a right to maintain a suit in admiralty for wrongful death on the high seas. Section 7 of the bill, crucial to the disposition of the issue here today, stated that "the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act *as to causes of action accruing within the territorial limits of any State.*" (Emphasis added.)

Before the bill went to the floor of the House, it was clear from the language of the bill and from the Reports of the Senate and the House Judiciary Committees that the federal right of action would be exclusive for deaths on the high seas and that the state wrongful-death statutes would provide the right of action for deaths on territorial waters. S. Rep. No. 216, 66th Cong., 1st Sess. (1919); H. R. Rep. No. 674, 66th Cong., 2d Sess. (1920). As the Court correctly observes: "§ 7, as originally proposed, ensured that [DOHSA] saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court." *Ante*, at 225.

Had the bill passed in that form, the resolution of this case would be clear—the federal statute would preclude application of state law for respondents' cause of action. During the floor debate in the House of Representatives, however, Representative Mann from Illinois successfully offered an amendment striking from § 7 the concluding phrase, "as to causes of action accruing within the territorial limits of any State." Thus, although the original § 7 preserved state-law rights of action within territorial waters, the ultimately enacted § 7 preserved these rights of action without geographic qualification. Although § 7 is plainly intended to save state remedies for death on the high seas, the Court today ignores the section's language and holds that it is a jurisdictional saving clause.

II

The starting point in statutory construction is, of course, the language of the statute itself. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 756 (1975) (POWELL, J., concurring). See *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102 (1980). The language of § 7, given scant attention by the Court, reads as codified:

> "§ 767. Exceptions from operation of chapter
>
> "The provisions of any State statute *giving or regulating rights of action or remedies for death* shall not be af-

> fected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone." 46 U. S. C. § 767 (emphasis added).

The terms of the provision are clear. The provision preserves state rights of action and state remedies for wrongful death without any territorial qualification. It encompasses not only jurisdiction, but also "rights of action" and "remedies." The geographic reach of these traditional rights of action is therefore undiminished by DOHSA.

The congressional debate and other legislative history cast no doubt on the plain meaning of § 7. It is true, as the Court states, that the debate on the Mann Amendment was "exceedingly confused and often ill informed." *Ante*, at 225. Judge Davis, who made a meticulous review of the congressional debate in his opinion for the Court of Appeals, stated:

> "The congressional debate reflects a number of differing concerns and beliefs on the part of the legislators. These include whether the federal courts would have exclusive jurisdiction of DOHSA claims and whether causes of action granted by state statutes would be affected or preempted by DOHSA. The debate is not couched in the most precise legal terminology, and it appears that the term 'jurisdiction' was used indiscriminately to refer to both the power of state or federal courts to hear a particular case and the power of a state to grant a right of recovery. . . . In this circumstance, an attempt to discern the congressional intent from the conflicting statements by participants in the debate is hopeless. It is also unnecessary in light of the clear language of the statute. Absent a clearly-expressed legislative intention to the contrary, the plain words of the statute must ordinarily be regarded as controlling." 754 F. 2d 1274, 1280–1282 (1985).

Despite the confusion of the debate, it *is* clear that the Mann Amendment removed the clause that expressly limited state remedies "to causes of action accruing within the territorial limits of any State." Accordingly, § 7, once confined to territorial waters, on its face extends to the high seas as well. Today's holding, by barring state rights of action for deaths occurring on the high seas, limits § 7 in a manner that Congress expressly rejected. Whatever the policy advantages such a reading may have, it is inappropriate for this Court to make the "judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 200 (1974).

III

The Court attempts to explain its holding through a comparison of § 7 with § 4 of DOHSA, and with the "saving to suitors" clause in the Judiciary Act of 1789, § 9, 1 Stat. 76 (codified, as amended, at 28 U. S. C. § 1333). I find neither argument convincing. Section 4 preserves "a right of action . . . granted by the law of any foreign State . . . *without abatement in respect to the amount for which recovery is authorized*, any statute of the United States to the contrary notwithstanding." (Emphasis added.) It is true that the italicized language is absent from § 7. But § 7 contains its own explicit language, since it expressly provides that state statutes "giving *or regulating rights of action or remedies for death* shall not be affected by this Act." (Emphasis added.) Thus, by its terms, § 7 protects the operation of state statutes that *either* create rights of action for wrongful death *or* "regulat[e]" the amount of those rights of action. That clear purpose is inconsistent with the notion that § 7 fails to preserve state-law rights of action on the high seas.

The Court's second argument, never advanced by any of the federal courts that have considered this issue, is that § 7 is merely a "jurisdictional saving clause" that preserves state courts' power to entertain certain causes of action for wrongful death. I cannot accept this argument because it is inconsistent not only with the plain language of the provision, but also with one of the clear purposes of § 7.

The Court concedes that the original version of § 7 preserved both state-law remedies for wrongful death occurring within territorial waters and state jurisdiction over those remedies. *Ante*, at 224, 225 ("§ 7, as originally proposed, ensured that the Act saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court"). The Court then asserts, however, that the Mann Amendment "extended the jurisdictional saving clause to the high seas but in doing so, it did not implicitly sanction the operation of state wrongful death statutes on the high seas in the same manner as the saving clause did in territorial waters." *Ante*, at 227.

It is not easy to understand how § 7 was transformed from a provision that preserved both state jurisdiction and state rights of action in territorial waters, into a mere "jurisdictional saving clause" with no power to preserve state rights of action on the high seas. The Mann Amendment did nothing more than remove a territorial restriction; all other clauses of § 7 remained intact. As Representative Mann stated: "If the amendment which I have suggested should be agreed to, the bill *would not interfere in any way with rights now granted by any State statute*, whether the cause of action accrued within the territorial limits of the State or not." 59 Cong. Rec. 4484 (1920) (emphasis added). Moreover, as already noted, construing § 7 as preserving only state jurisdiction on the high seas is at odds with the terms of the provision itself. The language plainly refers to "[t]he provisions of any State statute giving or regulating rights of action or remedies for death."[4]

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[4] Nor does the Court's extended discussion of *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (1917), see *ante*, at 224, 227–228, explain its view that the Mann Amendment converted § 7 into a jurisdictional saving clause. It is true that the uniformity requirement in *Jensen* was broad enough on

As final support for its reading of § 7, the Court argues that it would be "incongruous" to read § 7 as "preserv[ing] intact largely nonexistent or ineffective state law remedies for wrongful death on the high seas." *Ante*, at 230. Aside from the question whether this argument accurately portrays state-law remedies for death on the high seas, see *The Hamilton*, 207 U. S. 398 (1907) (Delaware right of action for wrongful death on the high seas); *La Bourgogne*, 210 U. S. 95, 138 (1908) (similar Louisiana statute, direct precedessor of current respondents' claim), it certainly is plausible to suggest that Congress may have wished to establish an assured and uniform federal right of action for wrongful death at sea. And in the light of the adoption of the Mann Amendment, it is not "incongruous" to believe that Congress, in providing that federal right of action, also decided to preserve the array of state-law remedies because these remedies sometimes—as is the case here—conferred upon a State's residents rights of recovery beyond those of the federal statute.

IV

The Court argues that preserving state rights of action for death on the high seas, in accordance with the plain language of § 7, would undermine a uniform federal remedy and conflict with the exclusive, federal character of most aspects of admiralty law. I agree that such a result undercuts a federal uniformity that seems desirable here, but it is not the role of this Court to reconsider the wisdom of a policy choice that Congress has already made. Congress enacted the Mann Amendment to remove the territorial restriction from § 7's preservation of state-law rights of action for wrongful death.

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its face to foreclose state wrongful-death rights of action. (But cf. 244 U. S., at 216 (state wrongful-death statute expressly exempted from *Jensen* rule)). Congress therefore might have believed that an express reservation of state-law rights of action was necessary to save state causes of action after Congress had enacted DOHSA. This concern, however, does not explain how the Mann Amendment transformed § 7 into a *jurisdictional* saving clause.

The Court now holds that those rights of action may not be enforced on the high seas, and thereby imposes an *exclusive* federal remedy that Congress declined to enact. We should respect the outcome of the legislative process and preserve State rights of action for wrongful death on the high seas until Congress legislates otherwise. Accordingly, I dissent.

ANDERSON ET AL. *v.* LIBERTY LOBBY, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1602. Argued December 3, 1985—Decided June 25, 1986

In *New York Times Co.* v. *Sullivan*, 376 U. S. 254, it was held that, in a libel suit brought by a public official (extended by later cases to public figures), the First Amendment requires the plaintiff to show that in publishing the alleged defamatory statement the defendant acted with actual malice. It was further held that such actual malice must be shown with "convincing clarity." Respondents, a nonprofit corporation described as a "citizens' lobby" and its founder, filed a libel action in Federal District Court against petitioners, alleging that certain statements in a magazine published by petitioners were false and derogatory. Following discovery, petitioners moved for summary judgment pursuant to Federal Rule of Civil Procedure 56, asserting that because respondents were public figures they were required to prove their case under the *New York Times* standards and that summary judgment was proper because actual malice was absent as a matter of law in view of an affidavit by the author of the articles in question that they had been thoroughly researched and that the facts were obtained from numerous sources. Opposing the motion, respondents claimed that an issue of actual malice was presented because the author had relied on patently unreliable sources in preparing the articles. After holding that *New York Times* applied because respondents were limited-purpose public figures, the District Court entered summary judgment for petitioners on the ground that the author's investigation and research and his reliance on numerous sources precluded a finding of actual malice. Reversing as to certain of the allegedly defamatory statements, the Court of Appeals held that the requirement that actual malice be proved by clear and convincing evidence need not be considered at the summary judgment stage, and that with respect to those statements summary judgment had been improperly granted because a jury could reasonably have concluded that the allegations were defamatory, false, and made with actual malice.

Held: The Court of Appeals did not apply the correct standard in reviewing the District Court's grant of summary judgment. Pp. 247–257.

(a) Summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. At the summary judgment stage, the trial judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. There is no such issue unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. In essence, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Pp. 247–252.

([illegible] A trial court ruling on a motion for summary judgment in a case such [illegible] this must be guided by the *New York Times* "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists, that is, whether the evidence is such that a reasonable jury might find that actual malice had been shown with convincing clarity. Pp. 252–256.

(c) A plaintiff may not defeat a defendant's properly supported motion for summary judgment in a libel case such as this one without offering any concrete evidence from which a reasonable jury could return a verdict in his favor and by merely asserting that the jury might disbelieve the defendant's denial of actual malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict. Pp. 256–257.

241 U. S. App. D. C. 246, 746 F. 2d 1563, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, *post*, p. 257. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 268.

David J. Branson argued the cause for petitioners. With him on the briefs was *David O. Bickart.*

Mark Lane argued the cause for respondents. With him on the brief were *Linda Huber* and *Fleming Lee.**

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*Briefs of *amici curiae* urging reversal were filed for the American Newspaper Publishers Association et al. by *Robert D. Sack, Robert S. Warren, W. Terry Maguire, Richard M. Schmidt, Jr., R. Bruce Rich, Lawrence Gunnels, Harvey L. Lipton, Peter C. Gould,* and *Jane E. Kirtley;* and for the Reader's Digest Association, Inc., by *Walter R. Allan* and *Karen J. Wegner.*

Briefs of *amici curiae* urging affirmance were filed for the American Legal Foundation by *Daniel J. Popeo;* and for the Synanon Church et al. by *Jonathan W. Lubell, Philip C. Bourdette, David R. Benjamin,* and *Andrew J. Weill.*

JUSTICE WHITE delivered the opinion of the Court.

In *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279–280 (1964), we held that, in a libel suit brought by a public official, the First Amendment requires the plaintiff to show that in publishing the defamatory statement the defendant acted with actual malice—"with knowledge that it was false or with reckless disregard of whether it was false or not." We held further that such actual malice must be shown with "convincing clarity." *Id.*, at 285–286. See also *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 342 (1974). These *New York Times* requirements we have since extended to libel suits brought by public figures as well. See, *e. g.*, *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967).

This case presents the question whether the clear-and-convincing-evidence requirement must be considered by a court ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in a case to which *New York Times* applies. The United States Court of Appeals for the District of Columbia Circuit held that that requirement need not be considered at the summary judgment stage. 241 U. S. App. D. C. 246, 746 F. 2d 1563 (1984). We granted certiorari, 471 U. S. 1134 (1985), because that holding was in conflict with decisions of several other Courts of Appeals, which had held that the *New York Times* requirement of clear and convincing evidence must be considered on a motion for summary judgment.[1] We now reverse.

I

Respondent Liberty Lobby, Inc., is a not-for-profit corporation and self-described "citizens' lobby." Respondent Willis Carto is its founder and treasurer. In October 1981,

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[1] See, *e. g.*, *Rebozo* v. *Washington Post Co.*, 637 F. 2d 375, 381 (CA5), cert. denied, 454 U. S. 964 (1981); *Yiamouyiannis* v. *Consumers Union of United States, Inc.*, 619 F. 2d 932, 940 (CA2), cert. denied, 449 U. S. 839 (1980); *Carson* v. *Allied News Co.*, 529 F. 2d 206, 210 (CA7 1976).

The Investigator magazine published two articles: "The Private World of Willis Carto" and "Yockey: Profile of an American Hitler." These articles were introduced by a third, shorter article entitled "America's Neo-Nazi Underground: Did *Mein Kampf* Spawn Yockey's *Imperium*, a Book Revived by Carto's Liberty Lobby?" These articles portrayed respondents as neo-Nazi, anti-Semitic, racist, and Fascist.

Respondents filed this diversity libel action in the United States District Court for the District of Columbia, alleging that some 28 statements and 2 illustrations in the 3 articles were false and derogatory. Named as defendants in the action were petitioner Jack Anderson, the publisher of The Investigator, petitioner Bill Adkins, president and chief executive officer of the Investigator Publishing Co., and petitioner Investigator Publishing Co. itself.

Following discovery, petitioners moved for summary judgment pursuant to Rule 56. In their motion, petitioners asserted that because respondents are public figures they were required to prove their case under the standards set forth in *New York Times*. Petitioners also asserted that summary judgment was proper because actual malice was absent as a matter of law. In support of this latter assertion, petitioners submitted the affidavit of Charles Bermant, an employee of petitioners and the author of the two longer articles.[2] In this affidavit, Bermant stated that he had spent a substantial amount of time researching and writing the articles and that his facts were obtained from a wide variety of sources. He also stated that he had at all times believed and still believed that the facts contained in the articles were truthful and accurate. Attached to this affidavit was an appendix in which Bermant detailed the sources for each of the statements alleged by respondents to be libelous.

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[2] The short, introductory article was written by petitioner Anderson and relied exclusively on the information obtained by Bermant.

Respondents opposed the motion for summary judgment, asserting that there were numerous inaccuracies in the articles and claiming that an issue of actual malice was presented by virtue of the fact that in preparing the articles Bermant had relied on several sources that respondents asserted were patently unreliable. Generally, respondents charged that petitioners had failed adequately to verify their information before publishing. Respondents also presented evidence that William McGaw, an editor of The Investigator, had told petitioner Adkins before publication that the articles were "terrible" and "ridiculous."

In ruling on the motion for summary judgment, the District Court first held that respondents were limited-purpose public figures and that *New York Times* therefore applied.[3] The District Court then held that Bermant's thorough investigation and research and his reliance on numerous sources precluded a finding of actual malice. Thus, the District Court granted the motion and entered judgment in favor of petitioners.

On appeal, the Court of Appeals affirmed as to 21 and reversed as to 9 of the allegedly defamatory statements. Although it noted that respondents did not challenge the District Court's ruling that they were limited-purpose public figures and that they were thus required to prove their case under *New York Times*, the Court of Appeals nevertheless held that for the purposes of summary judgment the requirement that actual malice be proved by clear and convincing evidence, rather than by a preponderance of the evidence, was irrelevant: To defeat summary judgment respondents did not have to show that a jury could find actual malice with "convincing clarity." The court based this conclusion on a perception that to impose the greater evidentiary burden at summary judgment "would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontroverted facts as well." 241 U. S. App. D. C., at 253, 746 F. 2d, at 1570. The court then held, with respect to nine of the statements, that summary judgment had been improperly granted because "a jury could reasonably conclude that the . . . allegations were defamatory, false, and made with actual malice." *Id.*, at 260, 746 F. 2d, at 1577.

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[3] In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 351 (1974), this Court summarized who will be considered to be a public figure to whom the *New York Times* standards will apply:

"[The public figure] designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions."

The District Court found that respondents, as political lobbyists, are the second type of political figure described by the *Gertz* court—a limited-purpose public figure. See also *Waldbaum* v. *Fairchild Publications, Inc.*, 201 U. S. App. D. C. 301, 306, 627 F. 2d 1287, 1292, cert. denied, 449 U. S. 898 (1980).

II

A

Our inquiry is whether the Court of Appeals erred in holding that the heightened evidentiary requirements that apply to proof of actual malice in this *New York Times* case need not be considered for the purposes of a motion for summary judgment. Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.

As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. See generally 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §2725, pp. 93–95 (1983). This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. Any proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes.

More important for present purposes, summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. In *First National Bank of Arizona* v. *Cities Service Co.*, 391 U. S. 253 (1968), we affirmed a grant of summary judgment for an antitrust defendant where the issue was whether there was a genuine factual dispute as to the existence of a conspiracy. We noted Rule 56(e)'s provision that a party opposing a properly supported motion for summary judgment "'may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.'" We observed further that

> "[i]t is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to

> trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." 391 U. S., at 288–289.

We went on to hold that, in the face of the defendant's properly supported motion for summary judgment, the plaintiff could not rest on his allegations of a conspiracy to get to a jury without "any significant probative evidence tending to support the complaint." *Id.*, at 290.

Again, in *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970), the Court emphasized that the availability of summary judgment turned on whether a proper jury question was presented. There, one of the issues was whether there was a conspiracy between private persons and law enforcement officers. The District Court granted summary judgment for the defendants, stating that there was no evidence from which reasonably minded jurors might draw an inference of conspiracy. We reversed, pointing out that the moving parties' submissions had not foreclosed the possibility of the existence of certain facts from which "it would be open to a jury . . . to infer from the circumstances" that there had been a meeting of the minds. *Id.*, at 158–159.

Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under Rule 56, but it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. As *Adickes*, *supra*, and *Cities Service*, *supra*, indicate, there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Cities Service*, *supra*, at 288–289. If the evidence is merely colorable, *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967) *(per curiam)*, or is not significantly probative, *Cities Service*, *supra*, at 290, summary judgment may be granted.

That this is the proper focus of the inquiry is strongly suggested by the Rule itself. Rule 56(e) provides that, when a properly supported motion for summary judgment is made,[4] the adverse party "must set forth specific facts showing that there is a genuine issue for trial."[5] And, as we noted above, Rule 56(c) provides that the trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. There is no requirement that the trial judge make findings of fact.[6] The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Petitioners suggest, and we agree, that this standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Brady* v. *Southern R. Co.*, 320 U. S. 476, 479–480 (1943). If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. *Wilkerson* v. *McCarthy*, 336 U. S. 53, 62 (1949). As the Court long ago said in *Improvement Co.* v. *Munson*, 14 Wall. 442, 448 (1872), and has several times repeated:

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[4] Our analysis here does not address the question of the initial burden of production of evidence placed by Rule 56 on the party moving for summary judgment. See *Celotex Corp.* v. *Catrett*, *post*, p. 317. Respondents have not raised this issue here, and for the purposes of our discussion we assume that the moving party has met initially the requisite evidentiary burden.

[5] This requirement in turn is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. In our analysis here, we assume that both parties have had ample opportunity for discovery.

[6] In many cases, however, findings are extremely helpful to a reviewing court.

> "Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." (Footnotes omitted.)

See also *Pleasants* v. *Fant*, 22 Wall. 116, 120–121 (1875); *Coughran* v. *Bigelow*, 164 U. S. 301, 307 (1896); *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 343 (1933).

The Court has said that summary judgment should be granted where the evidence is such that it "would require a directed verdict for the moving party." *Sartor* v. *Arkansas Gas Corp.*, 321 U. S. 620, 624 (1944). And we have noted that the "genuine issue" summary judgment standard is "very close" to the "reasonable jury" directed verdict standard: "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 745, n. 11 (1983). In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

B

Progressing to the specific issue in this case, we are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict—"whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." *Munson*, *supra*, at 448.

In terms of the nature of the inquiry, this is no different from the consideration of a motion for acquittal in a criminal case, where the beyond-a-reasonable-doubt standard applies and where the trial judge asks whether a reasonable jury could find guilt beyond a reasonable doubt. See *Jackson* v. *Virginia*, 443 U. S. 307, 318–319 (1979). Similarly, where the First Amendment mandates a "clear and convincing" standard, the trial judge in disposing of a directed verdict motion should consider whether a reasonable factfinder could conclude, for example, that the plaintiff had shown actual malice with convincing clarity.

The case for the proposition that a higher burden of proof should have a corresponding effect on the judge when deciding whether to send the case to the jury was well made by the Court of Appeals for the Second Circuit in *United States* v. *Taylor*, 464 F. 2d 240 (1972), which overruled *United States* v. *Feinberg*, 140 F. 2d 592 (1944), a case holding that the standard of evidence necessary for a judge to send a case to the jury is the same in both civil and criminal cases even though the standard that the jury must apply in a criminal case is more demanding than in civil proceedings. Speaking through Judge Friendly, the Second Circuit said: "It would seem at first blush—and we think also at second—that more 'facts in evidence' are needed for the judge to allow [reasonable jurors to pass on a claim] when the proponent is required to establish [the claim] not merely by a preponderance of the evidence but . . . beyond a reasonable doubt." 464 F. 2d, at 242. The court could not find a "satisfying explanation in the *Feinberg* opinion why the judge should not place this higher burden on the prosecution in criminal proceedings before sending the case to the jury." *Ibid.* The *Taylor* court also pointed out that almost all the Circuits had adopted something like Judge Prettyman's formulation in *Curley* v. *United States*, 160 F. 2d 229, 232–233 (1947):

> "The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the

> two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter."

This view is equally applicable to a civil case to which the "clear and convincing" standard applies. Indeed, the *Taylor* court thought that it was implicit in this Court's adoption of the clear-and-convincing-evidence standard for certain kinds of cases that there was a "concomitant duty on the judge to consider the applicable burden when deciding whether to send a case to the jury." 464 F. 2d, at 243. Although the court thought that this higher standard would not produce different results in many cases, it could not say that it would never do so.

Just as the "convincing clarity" requirement is relevant in ruling on a motion for directed verdict, it is relevant in ruling on a motion for summary judgment. When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.

Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. This conclusion is mandated by the nature of this determination. The question here is whether a jury could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law *or* that he did not. Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.

Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes*, 398 U. S., at 158–159. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249 (1948).

In sum, we conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages. Consequently, where the *New York Times* "clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.[7]

III

Respondents argue, however, that whatever may be true of the applicability of the "clear and convincing" standard at the summary judgment or directed verdict stage, the defendant should seldom if ever be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue. They rely on *Poller* v. *Columbia Broadcasting Co.*, 368 U. S. 464 (1962), for this proposition. We do not understand *Poller*, however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy or of legal malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict. Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Based on that Rule, *Cities Service*, 391 U. S., at 290, held that the plaintiff could not defeat the properly supported summary judgment motion of a defendant charged with a conspiracy without offering "any significant probative evidence tending to support the complaint." As we have recently said, "discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 512 (1984). Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery. We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial.

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[7] Our statement in *Hutchinson* v. *Proxmire*, 443 U. S. 111, 120, n. 9 (1979), that proof of actual malice "does not readily lend itself to summary disposition" was simply an acknowledgment of our general reluctance "to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." *Calder* v. *Jones*, 465 U. S. 783, 790–791 (1984).

IV

In sum, a court ruling on a motion for summary judgment must be guided by the *New York Times* "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists—that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity. Because the Court of Appeals did not apply the correct standard in reviewing the District Court's grant of summary judgment, we vacate its decision and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, dissenting.

The Court today holds that "whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case," *ante*, at 255.[1] In my view, the Court's analysis is deeply flawed, and rests on a shaky foundation of unconnected and unsupported observations, assertions, and conclusions. Moreover, I am unable to divine from the Court's opinion *how* these evidentiary standards are to be considered, or what a trial judge is actually supposed to do in ruling on a motion for summary judgment. Accordingly, I respectfully dissent.

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[1] The Court's holding today is not, of course, confined in its application to First Amendment cases. Although this case arises in the context of litigation involving libel and the press, the Court's holding is that "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Ante*, at 254. Accordingly, I simply do not understand why JUSTICE REHNQUIST, dissenting, feels it appropriate to cite *Calder* v. *Jones*, 465 U. S. 783 (1984), and to remind the Court that we have consistently refused to

To support its holding that in ruling on a motion for summary judgment a trial court must consider substantive evidentiary burdens, the Court appropriately begins with the language of Rule 56(c), which states that summary judgment shall be granted if it appears that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Court then purports to restate this Rule, and asserts that "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Ante,* at 248. No direct authority is cited for the proposition that in order to determine whether a dispute is "genuine" for Rule 56 purposes a judge must ask if a "reasonable" jury could find for the nonmoving party. Instead, the Court quotes from *First National Bank of Arizona* v. *Cities Service Co.*, 391 U. S.

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extend special procedural protections to defendants in libel and defamation suits. The Court today does nothing of the kind. It changes summary judgment procedure for *all* litigants, regardless of the substantive nature of the underlying litigation.

Moreover, the Court's holding is not limited to those cases in which the evidentiary standard is "heightened," *i. e.*, those in which a plaintiff must prove his case by more than a mere preponderance of the evidence. Presumably, if a district court ruling on a motion for summary judgment in a libel case is to consider the "quantum and quality" of proof necessary to support liability under *New York Times, ante,* at 254, and then ask whether the evidence presented is of "sufficient caliber or quantity" to support that quantum and quality, the court must ask the same questions in a garden-variety action where the plaintiff need prevail only by a mere preponderance of the evidence. In other words, today's decision by its terms applies to all summary judgment motions, irrespective of the burden of proof required and the subject matter of the suit.

253, 288–289 (1968), to the effect that a summary judgment motion will be defeated if "sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial," *ante*, at 249, and that a plaintiff may not, in defending against a motion for summary judgment, rest on mere allegations or denials of his pleadings. After citing *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970), for the unstartling proposition that "the availability of summary judgment turn[s] on whether a proper jury question [is] presented," *ante*, at 249, the Court then reasserts, again with no direct authority, that in determining whether a jury question is presented, the inquiry is whether there are factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Ante*, at 250. The Court maintains that this summary judgment inquiry "mirrors" that which applies in the context of a motion for directed verdict under Federal Rule of Civil Procedure 50(a): "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Ante*, at 251–252.

Having thus decided that a "genuine" dispute is one which is not "one-sided," and one which could "reasonably" be resolved by a "fair-minded" jury in favor of either party, *ibid.*, the Court then concludes:

> "Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards." *Ante*, at 254–255.

As far as I can discern, this conclusion, which is at the heart of the case, has been reached without the benefit of any support in the case law. Although, as noted above, the Court cites *Adickes* and *Cities Service*, those cases simply do not stand for the proposition that in ruling on a summary judgment motion, the trial court is to inquire into the "one-sidedness" of the evidence presented by the parties. *Cities Service* involved the propriety of a grant of summary judgment in favor of a defendant alleged to have conspired to violate the antitrust laws. The issue in the case was whether, on the basis of the facts in the record, a jury could *infer* that the defendant had entered into a conspiracy to boycott. No direct evidence of the conspiracy was produced. In agreeing with the lower courts that the *circumstantial* evidence presented by the plaintiff was insufficient to take the case to the jury, we observed that there was "one fact" that petitioner had produced to support the existence of the illegal agreement, and that that single fact could not support petitioner's *theory* of liability. Critically, we observed that "[t]he case at hand presents peculiar difficulties because the issue of fact crucial to petitioner's case is also an issue of law, namely the existence of a conspiracy." 391 U. S., at 289. In other words, *Cities Service* is at heart about whether certain facts can support inferences that are, as a matter of antitrust law, sufficient to support a particular theory of liability under the Sherman Act. Just this Term, in discussing summary judgment in the context of suits brought under the antitrust laws, we characterized both *Cities Service* and *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752 (1984), as cases in which "*antitrust law* limit[ed] the range of permissible inferences from ambiguous evidence. . . ." *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 588 (1986) (emphasis added). *Cities Service* thus provides no authority for the conclusion that Rule 56 requires a trial court to consider whether direct evidence produced by the parties is "one-sided." To the contrary, in *Matsushita*, the most recent case to cite and discuss *Cities Service*, we stated that the requirement that a dispute be "genuine" means simply that there must be more than "some metaphysical doubt as to the material facts." 475 U. S., at 586.[2]

Nor does *Adickes*, also relied on by the Court, suggest in any way that the appropriate summary judgment inquiry is whether the evidence overwhelmingly supports one party. *Adickes*, like *Cities Service*, presented the question of whether a grant of summary judgment in favor of a defendant on a conspiracy count was appropriate. The plaintiff, a white schoolteacher, maintained that employees of defendant Kress conspired with the police to deny her rights protected by the Fourteenth Amendment by refusing to serve her in one of its lunchrooms simply because she was white and accompanied by a number of black schoolchildren. She maintained, among other things, that Kress arranged with the police to have her arrested for vagrancy when she left the defendant's premises. In support of its motion for summary judgment, Kress submitted statements from a deposition of one of its employees asserting that he had not communicated or agreed with the police to deny plaintiff service or to have her arrested, and explaining that the store had taken the challenged action not because of the race of the plaintiff, but because it was fearful of the reaction of some of its customers if it served a racially mixed group. Kress also submitted affidavits from the Chief of Police and the arresting officers denying that the store manager had requested that petitioner be arrested, and noted that in the plaintiff's own deposition, she conceded that she had no knowledge of any communication between the police and any Kress employee and was relying on circumstantial evidence to support her allegations. In opposing defendant's motion for summary judgment, plaintiff stated that defendant in its moving papers failed to dispute an allegation in the complaint, a statement at her deposition, and an unsworn statement by a Kress employee all to the effect that there was a policeman in the store at the time of the refusal to serve, and that it was this policeman who subsequently made the arrest. Plaintiff argued that this sequence of events "created a substantial enough possibility of a conspiracy to allow her to proceed to trial. . . ." 398 U. S., at 157.

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[2] Writing in dissent in *Matsushita*, JUSTICE WHITE stated that he agreed with the summary judgment test employed by the Court, namely, that "'[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" 475 U. S., at 599. Whether the shift, announced today, from looking to a "reasonable" rather than a "rational" jury is intended to be of any significance, there are other aspects of the *Matsushita* dissent which I find difficult to square with the Court's holding in the present case. The *Matsushita* dissenters argued:

> ". . . [T]he Court summarizes *Monsanto Co.* v. *Spray-Rite Service Corp.*, *supra*, as holding that 'courts should not permit factfinders to infer conspiracies when such inferences are implausible. . . .' *Ante*, at 593. Such language suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff. *Cities Service* and *Monsanto* do not stand for any such proposition. Each of those cases simply held that a particular piece of evidence standing alone was insufficiently probative to justify sending a case to the jury. These holdings in no way undermine the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment.
>
> "If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law. If the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and confusing language." *Id.*, at 600–601 (footnote omitted).

In my view, these words are as applicable and relevant to the Court's opinion today as they were to the opinion of the Court in *Matsushita*.

We agreed, and therefore reversed the lower courts, reasoning that Kress "did not carry its burden because of its failure to foreclose the possibility that there was a policeman in the Kress store while petitioner was awaiting service, and that this policeman reached an understanding with some

Kress employee that petitioner not be served." *Ibid.* Despite the fact that *none of the materials relied on by plaintiff* met the requirements of Rule 56(e), we stated nonetheless that Kress failed to meet its initial burden of showing that there was no genuine dispute of a material fact. Specifically, we held that because Kress failed to negate plaintiff's materials suggesting that a policeman was in fact in the store at the time of the refusal to serve, "it would be open to a jury . . . to infer from the circumstances that the policeman and a Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service." *Id.*, at 158.

In *Adickes* we held that a jury might permissibly infer a conspiracy from the mere presence of a policeman in a restaurant. We never reached and did not consider whether the evidence was "one-sided," and had we done so, we clearly would have had to affirm, rather than reverse, the lower courts, since in that case there was no admissible evidence submitted by petitioner, and a significant amount of evidence presented by the defendant tending to rebut the existence of a conspiracy. The question we did reach was simply whether, as a matter of conspiracy law, a jury would be entitled, again, as a matter of law, to infer from the presence of a policeman in a restaurant the making of an agreement between that policeman and an employee. Because we held that a jury was entitled so to infer, and because the defendant had not carried its initial burden of production of demonstrating that there was no evidence that there was not a policeman in the lunchroom, we concluded that summary judgment was inappropriate.

Accordingly, it is surprising to find the case cited by the majority for the proposition that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Ante*, at 249. There was, of course, *no* admissible evidence in *Adickes* favoring the nonmoving plaintiff; there was only an unrebutted assertion that a Kress employee and a policemar were in the same room at the time of the alleged constitutional violation. Like *Cities Service*, *Adickes* suggests tha on a defendant's motion for summary judgment, a trial cour must consider whether, as a matter of the substantive law o the plaintiff's cause of action, a jury will be permitted to draw inferences supporting the plaintiff's legal theory. In *Citie* *Service* we found, in effect, that the plaintiff had failed t make out a prima facie case; in *Adickes* we held that th moving defendant had failed to rebut the plaintiff's prima facie case. In neither case is there any intimation that trial court should inquire whether plaintiff's evidence is "sig nificantly probative," as opposed to "merely colorable," or again, "one-sided." Nor is there in either case any sugges tion that once a nonmoving plaintiff has made out a prima facie case based on evidence satisfying Rule 56(e) that ther is any showing that a defendant can make to prevail on a mo tion for summary judgment. Yet this is what the Court ap pears to hold, relying, in part, on these two cases.[3]

As explained above, and as explained also by JUSTIC REHNQUIST in his dissent, see *post*, at 271, I cannot agre that the authority cited by the Court supports its position In my view, the Court's result is the product of an exercis

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[3] I am also baffled by the other cases cited by the majority to suppor its holding. For example, the Court asserts that "[i]f . . . evidence merely colorable, *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967) *(pe* *curiam)*, . . . summary judgment may be granted." *Ante*, at 249–250. I *Dombrowski*, we reversed a judgment granting summary judgment to th counsel to the Internal Security Subcommittee of the Judiciary Committe of the United States Senate because there was "controverted evidence i the record . . . which affords more than merely colorable substance" to th petitioners' allegations. 387 U. S., at 84. *Dombrowski* simply cannot b read to mean that summary judgment may be *granted* if evidence is merel colorable; what the case actually says is that summary judgment will b *denied* if evidence is "*controverted*," because when evidence is contro verted, assertions become colorable for purposes of motions for summar judgment law.

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akin to the child's game of "telephone," in which a message is repeated from one person to another and then another; after some time, the message bears little resemblance to what was originally spoken. In the present case, the Court purports to restate the summary judgment test, but with each repetition, the original understanding is increasingly distorted.

But my concern is not only that the Court's decision is unsupported; after all, unsupported views may nonetheless be supportable. I am more troubled by the fact that the Court's opinion sends conflicting signals to trial courts and reviewing courts which must deal with summary judgment motions on a day-to-day basis. This case is about a trial court's responsibility when considering a motion for summary judgment, but in my view, the Court, while instructing the trial judge to "consider" heightened evidentiary standards, fails to explain what that means. In other words, how does a judge assess how one-sided evidence is, or what a "fair-minded" jury could "reasonably" decide? The Court provides conflicting clues to these mysteries, which I fear can lead only to increased confusion in the district and appellate courts.

The Court's opinion is replete with boilerplate language to the effect that trial courts are not to weigh evidence when deciding summary judgment motions:

> "[I]t is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter . . . ." *Ante*, at 249.
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> "Our holding . . . does not denigrate the role of the jury. . . . Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Ante*, at 255.

But the Court's opinion is also full of language which could surely be understood as an invitation—if not an instruction—to trial courts to assess and weigh evidence much as a juror would:

> "When determining if a genuine factual issue . . . exists . . . , a trial judge must *bear in mind the actual quantum and quality* of proof necessary to support liability . . . . For example, *there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity* to allow a rational finder of fact to find actual malice by clear and convincing evidence." *Ante*, at 254 (emphasis added).
>
> "[T]he inquiry . . . [is] whether the evidence presents a *sufficient* disagreement to require submission to a jury or whether *it is so one-sided* that one party must prevail as a matter of law." *Ante*, at 251–252 (emphasis added).
>
> "[T]he judge must ask himself . . . whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Ante*, at 252.

I simply cannot square the direction that the judge "is not himself to weigh the evidence" with the direction that the judge also bear in mind the "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quantity" to meet that "quantum." I would have thought that a determination of the "caliber and quantity," *i. e.*, the importance and value, of the evidence in light of the "quantum," *i. e.*, amount "required," could *only* be performed by weighing the evidence.

If in fact, this is what the Court would, under today's decision, require of district courts, then I am fearful that this new rule—for this surely would be a brand new procedure—will transform what is meant to provide an expedited "summary" procedure into a full-blown paper trial on the merits. It is hard for me to imagine that a responsible counsel, aware that the judge will be assessing the "quantum" of the evidence he is presenting, will risk either moving for or responding to a summary judgment motion without coming forth with *all* of the evidence he can muster in support of his client's case. Moreover, if the judge on motion for summary judgment really is to weigh the evidence, then in my view grave concerns are raised concerning the constitutional right of civil litigants to a jury trial.

It may well be, as JUSTICE REHNQUIST suggests, see *post*, at 270–271, that the Court's decision today will be of little practical effect. I, for one, cannot imagine a case in which a judge might plausibly hold that the evidence on motion for summary judgment was sufficient to enable a plaintiff bearing a mere preponderance burden to get to the jury—*i. e.*, that a prima facie case had been made out—but insufficient for a plaintiff bearing a clear-and-convincing burden to withstand a defendant's summary judgment motion. Imagine a suit for breach of contract. If, for example, the defendant moves for summary judgment and produces one purported eyewitness who states that he was present at the time the parties discussed the possibility of an agreement, and unequivocally denies that the parties ever agreed to enter into a contract, while the plaintiff produces one purported eyewitness who asserts that the parties did in fact come to terms, presumably that case would go to the jury. But if the defendant produced not one, but 100 eyewitnesses, while the plaintiff stuck with his single witness, would that case, under the Court's holding, still go to the jury? After all, although the plaintiff's burden in this hypothetical contract action is to prove his case by a mere preponderance of the evidence, the judge, so the Court tells us, is to "ask himself . . . whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Ante*, at 252. Is there, in this hypothetical example, "a sufficient disagreement to require submission to a jury," or is the evidence "so one-sided that one party must prevail as a matter of law"? *Ante*, at 251–252. Would the result change if the plaintiff's one witness were now shown to be a convicted perjurer? Would the result change if, instead of a garden-variety contract claim, the plaintiff sued on a fraud theory, thus requiring him to prove his case by clear and convincing evidence?

It seems to me that the Court's decision today unpersuasively answers the question presented, and in doing so raises a host of difficult and troubling questions for which there may well be no adequate solutions. What is particularly unfair is that the mess we make is not, at least in the first instance, our own to deal with; it is the district courts and courts of appeals that must struggle to clean up after us.

In my view, if a plaintiff presents evidence which either directly or by permissible inference (and these inferences are a product of the substantive law of the underlying claim) supports all of the elements he needs to prove in order to prevail on his legal claim, the plaintiff has made out a prima facie case and a defendant's motion for summary judgment must fail regardless of the burden of proof that the plaintiff must meet. In other words, whether evidence is "clear and convincing," or proves a point by a mere preponderance, is for the factfinder to determine. As I read the case law, this is how it has been, and because of my concern that today's decision may erode the constitutionally enshrined role of the jury, and also undermine the usefulness of summary judgment procedure, this is how I believe it should remain.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The Court, apparently moved by concerns for intellectual tidiness, mistakenly decides that the "clear and convincing evidence" standard governing finders of fact in libel cases must be applied by trial courts in deciding a motion for summary judgment in such a case. The Court refers to this as a "substantive standard," but I think is is actually a procedural requirement engrafted onto Rule 56, contrary to our statement in *Calder* v. *Jones*, 465 U. S. 783 (1984), that

> "[w]e have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." *Id.*, at 790–791.

The Court, I believe, makes an even greater mistake in failing to apply its newly announced rule to the facts of this case. Instead of thus illustrating how the rule works, it contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds much like a treatise about cooking by someone who has never cooked before and has no intention of starting now.

There is a large class of cases in which the higher standard imposed by the Court today would seem to have no effect at all. Suppose, for example, on motion for summary judgment in a hypothetical libel case, the plaintiff concedes that his only proof of malice is the testimony of witness A. Witness A testifies at his deposition that the reporter who wrote the story in question told him that she, the reporter, had done absolutely no checking on the story and had real doubts about whether or not it was correct as to the plaintiff. The defendant's examination of witness A brings out that he has a prior conviction for perjury.

May the Court grant the defendant's motion for summary judgment on the ground that the plaintiff has failed to produce sufficient proof of malice? Surely not, if the Court means what it says, when it states: "Credibility determinations . . . are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Ante*, at 255.

The case proceeds to trial, and at the close of the plaintiff's evidence the defendant moves for a directed verdict on the ground that the plaintiff has failed to produce sufficient evidence of malice. The only evidence of malice produced by the plaintiff is the same testimony of witness A, who is duly impeached by the defendant for the prior perjury conviction. In addition, the trial judge has now had an opportunity to observe the demeanor of witness A, and has noticed that he fidgets when answering critical questions, his eyes shift from the floor to the ceiling, and he manifests all other indicia traditionally attributed to perjurers.

May the trial court at this stage grant a directed verdict? Again, surely not; we are still dealing with "credibility determinations."

The defendant now puts on its testimony, and produces three witnesses who were present at the time when witness A alleges that the reporter said she had not checked the story and had grave doubts about its accuracy as to plaintiff. Witness A concedes that these three people were present at the meeting, and that the statement of the reporter took place in the presence of all these witnesses. Each witness categorically denies that the reporter made the claimed statement to witness A.

May the trial court now grant a directed verdict at the close of all the evidence? Certainly the plaintiff's case is appreciably weakened by the testimony of three disinterested witnesses, and one would hope that a properly charged jury would quickly return a verdict for the defendant. But as long as credibility is exclusively for the jury, it seems the Court's analysis would still require this case to be decided by that body.

Thus, in the case that I have posed, it would seem to make no difference whether the standard of proof which the plaintiff had to meet in order to prevail was the preponderance of the evidence, clear and convincing evidence, or proof beyond a reasonable doubt. But if the application of the standards makes no difference in the case that I hypothesize, one may fairly ask in what sort of case *does* the difference in standards make a difference in outcome? Cases may be posed dealing with evidence that is essentially documentary, rather than testimonial; but the Court has held in a related context involving Federal Rule of Civil Procedure 52(a) that inferences from documentary evidence are as much the prerogative of the finder of fact as inferences as to the credibility of witnesses. *Anderson* v. *Bessemer City*, 470 U. S. 564, 574 (1985). The Court affords the lower courts no guidance whatsoever as to what, if any, difference the abstract standards that it propounds would make in a particular case.

There may be more merit than the Court is willing to admit to Judge Learned Hand's observation in *United States* v. *Feinberg*, 140 F. 2d 592, 594 (CA2), cert. denied, 322 U. S. 726 (1944), that "[w]hile at times it may be practicable" to "distinguish between the evidence which should satisfy reasonable men, and the evidence which should satisfy reasonable men beyond a reasonable doubt[,] . . . in the long run the line between them is too thin for day to day use." The Court apparently approves the overruling of the *Feinberg* case in the Court of Appeals by Judge Friendly's opinion in *United States* v. *Taylor*, 464 F. 2d 240 (1972). But even if the Court is entirely correct in its judgment on this point, Judge Hand's statement seems applicable to this case because the criminal case differs from the libel case in that the standard in the former is proof "beyond a reasonable doubt," which is presumably easier to distinguish from the normal "preponderance of the evidence" standard than is the intermediate standard of "clear and convincing evidence."

More important for purposes of analyzing the present case, there is no exact analog in the criminal process to the motion for summary judgment in a civil case. Perhaps the closest comparable device for screening out unmeritorious cases in the criminal area is the grand jury proceeding, though the comparison is obviously not on all fours. The standard for allowing a criminal case to proceed to trial is not whether the government has produced prima facie evidence of guilt beyond a reasonable doubt for every element of the offense, but only whether it has established probable cause. See *United States* v. *Mechanik*, 475 U. S. 66, 70 (1986). Thus, in a criminal case the standard used prior to trial is much more lenient than the "clear beyond a reasonable doubt" standard which must be employed by the finder of fact.

The three differentiated burdens of proof in civil and criminal cases, vague and impressionistic though they necessarily are, probably do make some difference when considered by the finder of fact, whether it be a jury or a judge in a bench trial. Yet it is not a logical or analytical message that the terms convey, but instead almost a state of mind; we have previously said:

> "Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among these three tests . . . may well be largely an academic exercise. . . . Indeed, the ultimate truth as to how the standards of proof affect decisionmaking may well be *unknowable*, given that factfinding is a process shared by countless thousands of individuals throughout the country. We probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence." *Addington* v. *Texas*, 441 U. S. 418, 424–425 (1979) (emphasis added).

The Court's decision to engraft the standard of proof applicable to a factfinder onto the law governing the procedural motion for a summary judgment (a motion that has always been regarded as raising a question of law rather than a question of fact, see, *e. g.*, *La Riviere* v. *EEOC*, 682 F. 2d 1275, 1277–1278 (CA9 1982) (Wallace, J.)), will do great mischief with little corresponding benefit. The primary effect of the Court's opinion today will likely be to cause the decisions of trial judges on summary judgment motions in libel cases to be more erratic and inconsistent than before. This is largely because the Court has created a standard that is different from the standard traditionally applied in summary judgment motions without even hinting as to how its new standard will be applied to particular cases.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. *v.* BROCK, SECRETARY OF LABOR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1777. Argued March 25, 1986—Decided June 25, 1986

To supplement state unemployment insurance benefits, the Trade Act of 1974 (Act) provides federally funded trade readjustment allowance (TRA) benefits to workers laid off because of competition from imports. As authorized by the Act, the Secretary of Labor (Secretary) has contracted out to state unemployment insurance agencies the job of making individual eligibility determinations for the benefits. To qualify for benefits, a worker must have at least 26 weeks of employment in the 52 weeks immediately preceding his layoff. In a 1975 policy handbook, the Secretary advised the state agencies that they should not count toward these 26 weeks leaves of absence, sick leaves, vacations, and military leaves. These guidelines were superseded by a 1981 amendment to the Act that permits inclusion of such periods of nonservice in determining a worker's period of employment, but the amendment was limited to benefits payable for weeks of unemployment beginning after September 30, 1981. Petitioner union and petitioner union members (some of whom had been denied benefits before October 1, 1981, because of the 1975 guidelines and some of whom were defending the award of benefits against appeals by their respective state agencies) filed an action in Federal District Court against the Secretary, claiming that his interpretation of the Act in the 1975 guidelines was incorrect, and seeking declaratory and injunctive relief. On cross-motions for summary judgment, the District Court first rejected the Secretary's argument that the provision of the Act, 19 U. S. C. § 2311(d), that makes entitlement determinations reviewable only "in the same manner and to the same extent as determinations under the applicable State law," precluded federal jurisdiction over the action. On the merits, the court held that the 1975 guidelines were inconsistent with the Act, and granted the requested relief. Without reaching the merits, the Court of Appeals reversed, holding that the union had no standing to bring the action. As to the individual union member plaintiffs, who claim to have been denied benefits because of an improper construction of the Act, the court, relying on § 2311(d)'s requirement, held that no relief could properly be awarded because the plaintiffs had failed to join as party-defendants the state agencies that had denied their claims.

Held:

1. Petitioner union has standing to litigate this action. Pp. 281–290.

(a) An association has standing to bring suit on behalf of its members when (1) "its members would otherwise have standing to sue in their own right"; (2) "the interests it seeks to protect are germane to the organization's purpose"; and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S. 333, 343. All three of these conditions have been met in this case. As to the first condition, § 2311(d) does not preclude a union member or any other aggrieved claimant from challenging the 1975 guidelines. The question is not whether there are any union members who might have circumvented any state administrative and judicial process in order to bring the claims that the union now seeks to litigate, but rather whether there are union members who have yet to receive either benefits they believe are due or a final state judgment that will preclude further consideration of their claims. Such individuals would have the live interest in challenging the guidelines that would support standing in this case. As to the second condition for associational standing, there is little question that the interests the union seeks to protect in this action are "germane" to its purpose of obtaining benefits, including unemployment benefits, for its members. As to the third condition, although the unique facts of each union member's claim will have to be considered by the state authorities before the member can receive the claimed benefits, the union can litigate this action without those individual members' participation and still ensure that the remedy, if granted, will benefit those members actually injured. Pp. 282–288.

(b) The principles of associational standing set out in *Hunt, supra*, are reaffirmed. The Secretary's suggestion that members of an association who wish to litigate common questions of law or fact against the same defendant should be permitted to proceed only pursuant to the class-action provisions of Federal Rule of Civil Procedure 23, fails to recognize the special features distinguishing suits by associations on behalf of their members from class actions. While a class action creates an ad hoc union of injured plaintiffs who may be linked only by their common claims, an association suing to vindicate its members' interests can draw upon a pre-existing reservoir of expertise and capital that can assist both courts and plaintiffs. In addition, the doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others. Here, the Secretary has given no reason to doubt the union's ability to proceed on behalf of its aggrieved members. Pp. 288–290.

2. The action can be maintained without the joinder as defendants of the state agencies administering the TRA benefit program. The action is not an appeal from an adverse benefit determination, removed to federal court, but is a challenge to federal guidelines that required that determination. Just as § 2311(d) cannot be read to bar federal jurisdiction over a challenge to the guidelines, that section does not demand that the state rules governing review of the entitlement decisions bind the federal court entertaining that challenge. Under circumstances where the state agencies would be bound to comply with the relief ordered here and are reimbursed by the Federal Government for TRA benefits they pay, the state agencies are not "indispensable parties" within the meaning of Federal Rule of Civil Procedure 19(b) whose absence from the action rendered the District Court unable to grant the relief sought. Pp. 290–293.

241 U. S. App. D. C. 106, 746 F. 2d 839, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 293. POWELL, J., filed a dissenting opinion, *post*, p. 296.

Marsha S. Berzon argued the cause for petitioners. With her on the briefs were *Jordan Rossen*, *Leonard Page*, and *Stephen P. Berzon*.

Deputy Solicitor General Kuhl argued the cause for respondent. With her on the brief were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Mark I. Levy*, *Leonard Schaitman*, and *William G. Cole*.*

JUSTICE MARSHALL delivered the opinion of the Court.

This suit was brought by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and several of its members challenging the Secretary of Labor's interpretation of the eligibility provisions of the Trade Act of 1974, 88 Stat. 1978, 19 U. S. C.

**Benjamin W. Heineman, Jr.*, and *Carter G. Phillips* filed a brief for the Chamber of Commerce of the United States et al. as *amici curiae* urging reversal.

§ 2101, which provides benefits to workers laid off because of competition from imports. The issues presented here are whether the Union has standing to sue in federal court on behalf of its affected members and whether such a suit can be maintained without the joinder as defendants of the state agencies that administer the benefit program in question.

I

To aid workers who have lost their jobs because of import competition, the Trade Act of 1974 established a program of trade readjustment allowance (TRA) benefits as a supplement to state unemployment insurance benefits. 19 U. S. C. § 2291. Under the Act's scheme, a group of workers, their union, or some other authorized representative may petition the Secretary of Labor to certify that their firm has been adversely affected by imports. §§ 2271–2273. If the Secretary issues a certificate of eligibility for such a group, workers within that group who meet certain standards of individual eligibility may then apply for and receive TRA benefits. These benefits are funded entirely by the Federal Government, as is the cost of administering the program.

While the Secretary of Labor cannot delegate his certification duties, the Act does permit him to contract out the job of making individual eligibility determinations to the state agencies that administer state unemployment insurance programs. The Secretary has in fact entered into such agreements with unemployment insurance agencies in each State and in the District of Columbia and Puerto Rico. Pursuant to the agreements, each of these "cooperating Stat[e] agencies," § 2311(a), becomes an "agent of the United States," § 2313(a), charged with processing applications and using federal funds to pay TRA benefits to individuals eligible under the Act. Review of eligibility decisions by these agencies is to be "in the same manner and to the same extent as determinations under the applicable State law and only in that manner and to that extent." § 2311(d). In making these eligibility determinations, however, state authorities are bound to apply the relevant regulations promulgated by the Secretary of Labor and the substantive provisions of the Act. 29 CFR § 91.51(c) (1985).

To qualify for TRA benefits under the Act, a worker must have "had, in the 52 weeks immediately preceding . . . separation, at least 26 weeks of employment at wages of $30 or more a week in adversely affected employment with a single firm or subdivision of a firm." 19 U. S. C. § 2291(2) (1976 ed.). In a 1975 policy handbook, the Secretary advised the state agencies that they should not count toward these 26 weeks

> "[p]eriods in which service is not being performed, such as leave of absence, sick or annual leave or vacation leave, and periods in which service is being performed for other than the adversely affected employer, such as military service, temporary loan or detail to another employer, or work for another employer while attached to the adversely affected employer . . . ." App. 85.

These guidelines were superseded in August 1981 by the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. 97–35, 95 Stat. 357, which amended the Trade Act to provide that "leave for purposes of vacation, sickness, injury, maternity, or inactive duty or active duty military service for training" is to be included in determining an individual's period of employment with an adversely affected firm. 19 U. S. C. § 2291(a)(2)(A). The effect of this amendment, however, was limited to TRA benefits "payable for weeks of unemployment which begin after September 30, 1981." OBRA, § 2514(a)(2)(B), 95 Stat. 889, note following 19 U. S. C. § 2291.

Shortly after the passage of the OBRA, petitioners, the UAW and 11 of its members—some of whom had been denied benefits for weeks of employment before October 1, 1981, because of the interpretation of § 2291 in the 1975 handbook and some of whom were defending the award of benefits against appeals by their respective state agencies—filed this suit in District Court against the Secretary of Labor. Claiming that the Secretary's interpretation had been incorrect and, to the extent that it related to military leave, in violation of the Veterans' Employment and Readjustment Act of 1972, 38 U. S. C. §2013, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U. S. C. §§2014, 2024, petitioners sought a declaration that the interpretation was improper and an injunction requiring the Secretary both to notify all cooperating state agencies of the invalidity of the handbook and to direct those agencies to review and reprocess all cases in which TRA benefits had been denied.

On cross-motions for summary judgment, the District Court first rejected the Secretary's argument that §2311(d), which makes entitlement determinations reviewable only "in the same manner and to the same extent as determinations under the applicable State law," precluded federal jurisdiction over the action. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* v. *Donovan,* 568 F. Supp. 1047, 1050–1052 (DC 1983). It noted:

> "In the typical case the Act envisions that a disappointed applicant for TRA benefits appeals to the state court the administering agency's application of the pertinent guidelines or regulations to the facts of his case. The instant case, however, is atypical. Here, plaintiffs allege that the guidelines themselves are invalid; they do not contest the particulars of the application of the guidelines to the facts of individual cases." *Id.*, at 1050.

On the merits of the complaint, the court held that the 1975 guidelines were indeed inconsistent with the Trade Act and the Veterans' Readjustment Assistance Act of 1972. It therefore ordered the Secretary to notify all cooperating state agencies of the Act's proper construction and to direct those agencies to process anew, applying the proper eligibility standards, any TRA claims wrongfully denied as a result of the 1975 guidelines.

Without reaching the merits, a divided panel of the Court of Appeals reversed. 241 U. S. App. D. C. 106, 746 F. 2d 839 (1984). The court first noted that the UAW "is not an appropriate representative of those TRA claimants who were not its members," *id.*, at 109, 746 F. 2d, at 842, and that, at this stage of the proceedings, it would be "impermissible" to treat the suit as a class action on behalf of all disappointed claimants, *id.*, at 108, 746 F. 2d, at 841. The court then held that the UAW could not even represent the interests of those claimants who *were* union members. It reasoned:

> "In this case . . . , the Union has alleged no injury to itself; nor are the members' associational rights affected. . . . It seeks standing solely because some of the claimants, but far from all, were members of the Automobile Workers Union. Many of the members of the Union, however, have not had their employment terminated because of increasing imports. They have no interest in this case and no standing to seek any judicial relief. Those members of the Union who were disappointed claimants of the benefits have been injured, or denied advantages, in various amounts. The controversy could draw to a conclusion in these proceedings only if each individual claimant was a party plaintiff." *Id.*, at 109, 746 F. 2d, at 842.

Turning to the six named plaintiffs who claimed to have been denied administrative awards of benefits because of an improper construction of § 2291, the court held that, even assuming that § 2311(d) did not preclude federal jurisdiction, "no relief could properly be awarded in this action" because plaintiffs had failed to join as party-defendants the cooperating state agencies that had denied their claims. *Id.*, at 111, 746 F. 2d, at 844. Relying on the requirement of § 2311(d) "that review of determinations with respect to TRA benefits must be 'in the same manner' as a determination under the state's unemployment insurance law," the court concluded:

> "Judicial review of a state agency's determination of benefits under its own unemployment insurance law may not be had without the presence of the state agency, [and] since the state agencies are outside the district court's jurisdiction, it may not be had here." *Id.*, at 110, 746 F. 2d, at 843.

We granted certiorari to consider the procedural issues raised by the Court of Appeals' decision, 474 U. S. 900 (1985). We now reverse.

II

The first question raised by the Court of Appeals' decision is a simple one: Does the UAW have standing to challenge the 1975 policy directive that allegedly resulted in the denial of TRA benefits to thousands of the Union's members? See Complaint ¶69. As the Court of Appeals properly noted, "the Union has alleged no injury to itself; nor are the members' associational rights affected," 241 U. S. App. D. C., at 109, 746 F. 2d, at 842. The inquiry here is thus whether the UAW may proceed solely as a representative of those of its members injured by the Secretary's policy.

It has long been settled that "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members. *E. g., National Motor Freight Assn.* v. *United States*, 372 U. S. 246 (1963)." *Warth* v. *Seldin*, 422 U. S. 490, 511 (1975). While the "possibility of such representational standing . . . does not eliminate or attenuate the constitutional requirement of a case or controversy," *ibid.;* see *Sierra Club* v. *Morton*, 405 U. S. 727 (1972), we have found that, under certain circumstances, injury to an organization's members will satisfy Article III and allow that organization to litigate in federal court on their behalf. See *Simon* v. *Eastern Kentucky Welfare Rights*

Organization, 426 U. S. 26, 40 (1976). In *Warth, supra,* we set out the nature of these circumstances:

> "The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." *Id.*, at 511.

Subsequently, this doctrine was stated as a three-part test:

> "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333, 343 (1977).

The Court of Appeals here held that the UAW could not litigate its challenge to the Secretary's policy directive on behalf of its members because it found that the third of these conditions was not present in this case. Defending the court's decision, however, the Secretary argues that none of the three has been satisfied. We will consider each in turn.

A

Addressing the first part of the analysis in *Hunt*, the Secretary does not dispute petitioners' claim that a large number of UAW members were denied TRA benefits by their respective state agencies as a result of his Department's interpretation of § 2291(2) between 1975 and 1981. His argument is not that all members whom the UAW purports to represent have suffered no injury. Rather, he relies on 19 U. S. C. §2311(d), which makes TRA entitlement determinations by state agencies "subject to review in the same manner and to the same extent as determinations under the applicable State law and only in that manner and to that extent," and maintains that not a single member of the UAW—or any other aggrieved TRA claimant—can challenge the 1975 policy directive without running afoul of settled principles of administrative finality and judicial comity, as well as statutory intent.

The reasons the Secretary gives for the preclusion of various UAW members differ, but the end result is the same. TRA claimants who were awarded benefits and whose cases were finally resolved in their favor on judicial review cannot challenge the Secretary's interpretation of the Trade Act because they were not injured by it. At the same time, claimants denied benefits in final state judicial decisions are barred by res judicata from raising any eligibility claim in federal court. As for workers, who, at the time the suit was brought, had claims pending in state court after either favorable or unfavorable administrative determinations, the Secretary argues that it would "be contrary to Congress's incorporation of the state system into the administration of the Trade Act, and an affront to the integrity and authority of the state courts, to allow claimants whose cases were under state judicial review to pretermit that process by proceeding in federal court." Brief for Respondent 16. Workers with claims still pending in state administrative proceedings cannot complain, according to the Secretary, because they have yet to suffer any cognizable injury and may not circumvent state processes. And workers who failed to seek judicial review of adverse administrative determinations should also be barred from coming to federal court because their inaction has allowed those determinations to become final.

The Secretary's arguments simply miss the point of petitioners' claims. The statutory challenges raised here will no doubt affect the outcome of individual entitlement determinations if petitioners are successful on the merits of their suit. However, this action does not directly seek TRA benefits. In accordance with § 2231(d), decisions as to the eligibility of individual claimants for benefits will remain the province of state authorities. The question is thus not whether there are any individual members of the UAW who might have circumvented state administrative and judicial processes in order to bring the claims that the UAW now seeks to litigate. Rather, it is whether there are members of the UAW who have yet to receive either the TRA benefits they believe they are due or a final state judgment that would preclude further consideration of their eligibility claims. Such individuals would have the live interest in challenging the Labor Department guidelines that would support standing in this case. And there is no question here that among the UAW's members are many such individuals.

At bottom, the Secretary's invocation of administrative exhaustion principles is merely a variant of his argument that § 2311(d) irrevocably commits to state processes all claims relating to TRA entitlements. Citing this Court's recent decision in *Green* v. *Mansour*, 474 U. S. 64 (1985), he argues that "this suit, like *Green*, is an impermissible attempt to gain a federal judicial ruling to serve as the predicate for a state claim that could not be brought directly in federal court." Brief for Respondent 21. In *Green*, this Court held that when the Eleventh Amendment bars a federal court from directly ordering a State to pay damages for a past constitutional violation, the court cannot enter a declaratory judgment that plaintiffs might use as res judicata in state-court damages actions. The Eleventh Amendment bar that precluded equitable relief in *Green*, however, has little in common with 19 U. S. C. § 2311(d). The Trade Act provision does not foreclose review in federal court of every claim relating to the Act's application by federal and state officials. While the Act vested state courts with exclusive jurisdiction over claims challenging a state agency's application of federal guidelines to the benefit claims of individual employees, there is no indication that Congress intended § 2311(d) to deprive federal district courts of subject-matter jurisdiction under 28 U. S. C. § 1331(a) (1976 ed.) to hear statutory or constitutional challenges to the federal guidelines themselves. Indeed, we have frequently upheld a contrary principle: that although review of individual eligibility determinations in certain benefit programs may be confined by state and federal law to state administrative and judicial processes, claims that a program is being operated in contravention of a federal statute or the Constitution can nonetheless be brought in federal court. See *Ohio Bureau of Employment Services* v. *Hodory*, 431 U. S. 471 (1977); *Fusari* v. *Steinberg*, 419 U. S. 379 (1975); *Christian* v. *New York State Dept. of Labor*, 414 U. S. 614 (1974); *California Dept. of Human Resources Development* v. *Java*, 402 U. S. 121 (1971); cf. *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 678 (1986) (judicial review available for challenge to Secretary's regulations even where statute bars review of determinations of specific benefit amounts). In *Christian*, *supra*, for example, former employees denied unemployment compensation benefits in state proceedings brought an action in District Court alleging that the Secretary of Labor and the state agency acting as his agent had not adhered to the procedural guarantees of the Unemployment Compensation for Federal Employees Program. Even though the provision governing review of benefit determinations in that program, 5 U. S. C. § 8502(d), is nearly identical to 19 U. S. C. § 2311(d), we noted that the court had jurisdiction over plaintiffs' claims against both state and federal defendants. 414 U. S., at 617, n. 5.

As we find § 2311(d) to pose no bar to petitioners' claims, we see no jurisdictional impediment to this suit in federal court challenging a federal official's interpretation of a federal statute. In view of the extent to which state agencies are bound to adhere to the Secretary's directives with respect to the administration and interpretation of the Trade Act, see *infra*, at 292, such a direct challenge is not only proper, but appropriate.

B

Having found that at least some members of the UAW would have had standing to bring this suit in their own right, we need pause only briefly to consider whether the second of *Hunt*'s preconditions for associational standing has been satisfied here. For there is little question that the interests that the UAW seeks to protect in this suit are "germane to the organization's purpose," *Hunt*, 432 U. S., at 343. The UAW's Constitution announces that one of the Union's goals is "to work for legislation on a national scale, having as its object the establishment of real social and unemployment insurance, the expense of which is to be borne by the employer and the Government." Constitution of the International Union, UAW, Art. 2, §4 (quoted in Brief for Petitioners 14–15). In pursuit of that goal, the leadership of the UAW, along with other representatives of organized labor, lobbied hard for the establishment of the TRA benefit program. See, *e. g.*, Trade Reform Act of 1973: Hearings on H. R. 6767 before the House Committee on Ways and Means, 93d Cong., 1st Sess., pt. 3, pp. 849–914 (1973) (testimony of Leonard Woodcock, President of the UAW).

Recognizing the interest of organized labor in obtaining benefits for its workers, Congress gave unions a role in the administration of the TRA program, allowing them to petition the Secretary to certify that particular firms have been adversely affected by imports. 19 U. S. C. §§2271–2273. Once the issuance of such a certification permits individual union members to file for TRA benefits, a union like the UAW—whose members, we are told, have constituted over 40% of the workers certified as eligible to apply for TRA benefits between April 1975 and January 1984, Brief for Petitioners 15—surely maintains an interest in ensuring that its members receive all the benefits available under the Act.

C

Relying on our decision in *Warth* v. *Seldin*, 422 U. S. 490 (1975), the Court of Appeals concluded that the UAW had failed to satisfy the last of the preconditions for associational standing set out in *Hunt*. In *Warth*, we noted that even where the members of an association have suffered the sort of injury that might otherwise support a suit by the association, "whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought." 422 U. S., at 515. An organization of construction firms, we held, could not seek damages for the profits and business lost by its members because "whatever injury might have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof." *Id.*, at 515–516. Each member therefore had to be a party to the suit, and the association lacked standing to proceed on his behalf. Likening the instant case to *Warth*, the Court of Appeals noted that because those UAW members "who had suffered an alleged injury had done so in varying amounts requiring individualized proof," the relief sought here could not be obtained unless "each individual claimant was a party plaintiff." 241 U. S. App. D. C., at 109, 746 F. 2d, at 842.

Like the Secretary in his arguments before this Court, the Court of Appeals misconstrued the nature of petitioners' claims. Neither these claims nor the relief sought required the District Court to consider the individual circumstances of any aggrieved UAW member. The suit raises a pure question of law: whether the Secretary properly interpreted the Trade Act's TRA eligibility provisions. Cf. *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 40, n. 8 (1981). And the relief requested, and granted by the District Court, leaves any questions regarding the eligibility of individual TRA claimants to the state authorities given jurisdiction over such questions by 19 U. S. C. § 2311(d). See *Bowen* v. *City of New York*, 476 U. S. 467, 485 (1986) ("[B]y ordering simply that the claims be reopened at the administrative level, the District Court showed proper respect for the administrative process"). Thus, though the unique facts of each UAW member's claim will have to be considered by the proper state authorities before any member will be able to receive the benefits allegedly due him, the UAW can litigate this case without the participation of those individual claimants and still ensure that "the remedy, if granted, will inure to the benefit of those members of the association actually injured," *Warth*, *supra*, at 515.

III

As an alternative basis for affirming the Court of Appeals, the Secretary asks that we reconsider and reject the principles of associational standing set out in *Hunt*. He suggests that "at least absent a showing of particularized need," members of an association who wish to litigate common questions of law or fact against the same defendant be permitted to proceed only pursuant to the class-action provisions of Federal Rule of Civil Procedure 23. Brief for Respondent 34.*

Both associational standing and Rule 23 are "designed to serve precisely the same purpose," according to the Secretary: "to facilitate, in a fair and efficient manner, the collective adjudication of the common rights of an association's members." *Id.*, at 37. Rule 23, however, contains special safeguards to ensure that the diverse interests of class members are properly represented by the named plaintiff seeking to bring a case on their behalf. No such adequacy of representation, the Secretary argues, is guaranteed by the approach this Court has taken to associational standing in *Warth*, *Hunt*, and other cases. Yet an association might prove an inadequate representative of its members' legal interests for a number of reasons. It might lack resources or experience or might bring lawsuits without authorization from its membership. In addition, the litigation strategy selected by the association might reflect the views of only a bare majority—or even an influential minority—of the full membership.

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*Even while contending that UAW members should have brought their claims in the form of a class action, the Secretary argues that, at this stage of the litigation, certification of the members as a class would be inappropriate. Because we find that the UAW has standing to maintain this action on behalf of its affected members, we need not consider whether it would have been proper to treat this suit as a class action once the District Court had entered judgment.

The Secretary's presentation, however, fails to recognize the special features, advantageous both to the individuals represented and to the judicial system as a whole, that distinguish suits by associations on behalf of their members from class actions. While a class action creates an ad hoc union of injured plaintiffs who may be linked only by their common claims, an association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital. "Besides financial resources, organizations often have specialized expertise and research resources relating to the subject matter of the lawsuit that individual plaintiffs lack." Note, From Net to Sword: Organizational Representatives Litigating Their Members' Claims, 1974 U. Ill. L. Forum 663, 669. These resources can assist both courts and plaintiffs. As one court observed of an association's role in pending litigation: "[T]he interest and expertise of this plaintiff, when exerted on behalf of its directly affected members, assure 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.'" *Harlem Valley Transportation Assn.* v. *Stafford*, 360 F. Supp. 1057, 1065 (SDNY 1973), quoting *Baker* v. *Carr*, 369 U. S. 186, 204 (1962).

In addition, the doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others. "The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 187 (1951) (Jackson, J., concurring); see *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 459 (1958) (association "is but the medium through which its individual members seek to make more effective the expression of their views"). The very forces that cause individuals to band together in an association will thus provide some guarantee that the association will work to promote their interests.

We are not prepared to dismiss out of hand the Secretary's concern that associations allowed to proceed under *Hunt* will not always be able to represent adequately the interests of all their injured members. Should an association be deficient in this regard, a judgment won against it might not preclude subsequent claims by the association's members without offending due process principles. And were we presented with evidence that such a problem existed either here or in cases of this type, we would have to consider how it might be alleviated. However, the Secretary has given us absolutely no reason to doubt the ability of the UAW to proceed here on behalf of its aggrieved members, and his presentation has fallen far short of meeting the heavy burden of persuading us to abandon settled principles of associational standing. See *Vasquez* v. *Hillery*, 474 U. S. 254, 265–266 (1986). We therefore reaffirm the principles we set out in *Hunt*, and hold that the UAW has standing to litigate this action.

IV

Our conclusion that the UAW has standing would be of little consequence if we agreed with the Court of Appeals that "the complaint should be dismissed because it was filed without the joinder of necessary parties," namely, the cooperating state agencies whose adverse benefit determinations gave rise to the injuries complained of here. 241 U. S. App. D. C., at 110, 746 F. 2d, at 843. Because petitioners appear to have conceded that the state agencies are outside the jurisdiction of the District Court, Brief for Petitioners 44, n. 44, a demand that all the agencies involved be named as defendants would bar the UAW from proceeding any further with this action. However, we believe that the Court of Appeals' resolution of the joinder issue was erroneous.

In part, the Court of Appeals' decision was based upon its reading 19 U. S. C. § 2311(d) to require that the state procedural rules applicable to the review of individual entitlement determinations be applied in this case. Since, under state law, review of an individual TRA claimant's eligibility determination cannot be had without the joinder of the state agency that made that determination, the Court of Appeals reasoned that a plaintiff could not pursue the claims raised here unless he joined as defendant the state agency whose reliance on the 1975 handbook had allegedly denied him TRA benefits. As should be clear from the foregoing discussion of the standing issue, however, the court's application of § 2311(d) was founded on a mischaracterization of this lawsuit. This action is not an appeal from an adverse benefit determination, removed to federal court. It is a challenge to the federal guidelines that required those determinations. And just as § 2311(d) cannot be read to bar federal jurisdiction over a challenge to the Secretary's statutory interpretation, so § 2311(d) does not demand that the state rules governing review of agency entitlement decisions bind the federal court entertaining that challenge.

The second basis of the Court of Appeals' decision was its concern that without the joinder of every state agency whose cooperation was needed to effect the relief granted by the District Court against the Secretary, such relief might "be a futile thing except to the extent that voluntary compliance [by those agencies] with the request of the Secretary may be expected." 241 U. S. App. D. C., at 111, 746 F. 2d, at 844. We do not share this fear. If upon reaching the merits of this case, the Court of Appeals upholds the relief ordered by the District Court, we have little doubt that the state agencies, which have agreed to administer TRA benefits as "agent[s] of the United States," 19 U. S. C. §§ 2311(a), 2313(a), would obey the Secretary's directive to process anew any TRA claims wrongfully denied as a result of the 1975 handbook's interpretation of the Trade Act.

Regulations promulgated by the Secretary provide that "[i]n making determinations, redeterminations, and in connection with proceedings for review thereof," a cooperating state agency "shall be an agent of the United States and shall carry out fully the purpose stated in § 91.2." 29 CFR § 91.51(d) (1985). Among the goals set out in § 91.2 of those regulations is "to implement the provisions of the Act uniformly and effectively throughout the United States." State agencies that have entered into agreements with the Secretary would thus be bound to comply with the relief ordered here. Were a state agency to balk at engaging in the reprocessing the Secretary would order pursuant to the court's injunction, it could be found in breach of its agreement. 29 CFR § 91.63(e) (1985). Such a finding would cause employers in that agency's State to lose certain tax credits against their liability for the Federal Unemployment Tax. 26 U. S. C. § 3302(c)(3). In any event, since state agencies are fully reimbursed by the Federal Government for the TRA benefits they pay and for the administrative costs of processing those payments, it seems unlikely that a directive from the Secretary would meet any resistance from his agents.

Under these circumstances, we do not believe that the state agencies should be considered "indispensable parties" within the meaning of Federal Rule of Civil Procedure 19(b), whose absence from this action rendered the District Court unable to grant in full the relief sought by petitioners. Furthermore, given that the only prejudice to absent third parties suggested here is administrative work for which the agencies will be fully reimbursed, it would be indeed odd were we to prevent this suit from going forward simply because there is a slight chance that petitioners will not be able to obtain the full extent of the relief they seek.

V

We hold that the UAW has standing to proceed in this case, and that petitioners' failure to join the various cooperating state agencies poses no obstacle to the suit. It remains for the Court of Appeals to consider the merits of the District Court's decision and any procedural issues properly preserved and raised.

The judgment of the Court of Appeals is reversed, and the case is remanded to that court for proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

I disagree with the Court's conclusion that the District Court properly exercised jurisdiction over this case.

Section 239(d) of the Trade Act of 1974, 19 U. S. C. §2311(d), provides that "[a] determination by a cooperating State agency with respect to entitlement to program benefits . . . is subject to review in the same manner and to the same extent as determinations under the applicable State law [regarding unemployment compensation benefits] and only in that manner and to that extent." The legislative history explains that "[t]he bill would have the effect of channeling all questions arising from determinations by State agencies through the normal State review procedure." S. Rep. No. 93–1298, p. 139 (1974). Congress thus expressed the intent that once a claim for trade readjustment allowance (TRA) benefits is submitted to a cooperating state agency, the agency and state courts shall have exclusive jurisdiction to determine *all* questions, legal as well as factual, regarding the claim.

The Court treats § 239(d) as inapplicable to the present case on the ground that petitioners have not requested federal-court review of any particular benefit determination under the relevant federal guideline, but instead challenge the guideline itself. *Ante*, at 285. The distinction between a challenge to the guideline and a challenge to benefit determinations might be meaningful if petitioners had only challenged the application of the guideline to as-yet-unsubmitted claims, but that is not this case. At the time the District Court entered its judgment, the guideline at issue had been superseded for nearly 22 months, and the only live controversy related to the cooperating state agencies' applications of the guideline to already-submitted claims.[1] Thus, this suit is precluded by Congress' clearly expressed intent to commit to the state review process the adjudication of all questions regarding TRA benefit claims under submission to a state agency.

In explaining its holding that § 239(d) does not apply to this case, the Court states that "although review of individual eligibility determinations in certain benefit programs may be confined by state and federal law to state administrative and judicial processes, claims that a program is being operated in contravention of a federal statute or the Constitution can nonetheless be brought in federal court." *Ibid.* If the Court means that this case could have been brought even if the underlying benefit claims were state unemployment compensation claims, I disagree. In such a case, petitioners' suit, which seeks declaratory and injunctive relief for the sole purpose of providing a predicate for the recovery of already-accrued benefit claims in state court, would have been barred by the Eleventh Amendment. *Green* v. *Mansour*, 474 U. S. 64 (1985).[2] Of course, the Eleventh Amendment does not directly apply in the present case, since TRA benefits are paid entirely from federal funds, but what § 239(d) commands a federal court to do is treat questions arising from TRA benefit determinations *as if* they were questions arising from benefit determinations under state unemployment compensation law. Under that standard, this is not a case that should be adjudicated by the federal courts.[3] Accordingly, I dissent from the Court's decision to address petitioners' claims on the merits.

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[1] The claims in this case related to weeks of unemployment beginning prior to October 1, 1981. Brief for Petitioners 4, n. 4. When the District Court entered its judgment on July 28, 1983, the relief granted related only to already-accrued claims for periods 22 months past or older. The record does not indicate that any unadjudicated claims for the period preceding October 1, 1981, remained outstanding at the time the District Court's opinion issued.

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[2] The cases cited by the Court that involve claims for state unemployment compensation benefits—*Ohio Bureau of Employment Services* v. *Hodory*, 431 U. S. 471 (1977), *Fusari* v. *Steinberg*, 419 U. S. 379 (1975), and *California Dept. of Human Resources Development* v. *Java*, 402 U. S. 121 (1971)—are not to the contrary. These cases concern requests for declarations or injunctions that pertain at least in part to future claims for benefits, see, *e. g.*, *Hodory*, *supra*, at 475, which is not true of petitioners' suit as of the time the District Court issued its judgment, see n. 1, *supra*. Also, whether or not the Eleventh Amendment might have been a bar to any aspect of the relief sought in *Hodory*, *Fusari*, or *Java*, the defendant state agency failed to raise the issue.

[3] *Christian* v. *New York Dept. of Labor*, 414 U. S. 614 (1974), is not sound support for the Court's conclusion that the present case is properly in federal court. In *Christian*, the Court never directly considered the jurisdictional implications of 5 U. S. C. § 8502, the analogue of § 239(d) in this case. The only jurisdictional question the Court squarely addressed was whether mandamus jurisdiction lay against the Secretary of Labor, and the Secretary in fact conceded that such jurisdiction was proper. *Id.*, at 617, n. 3. Arguably, any bar to federal-court adjudication presented by the jurisdictional statute in *Christian* is, like an Eleventh Amendment bar, waivable by the defendant. In any event, the Court's failure to squarely consider the jurisdictional question in *Christian* makes it inappropriate to rely on that case for guidance in determining the jurisdictional question here.

JUSTICE POWELL, dissenting.

The Court today holds that petitioner UAW has standing to proceed in a suit challenging the Secretary of Labor's interpretation of the eligibility provisions of the Trade Act, codified at 19 U. S. C. § 2291, because those members of the UAW who have claims pending before a state administrative agency would have standing to bring a similar suit. The record, however, provides no information as to how many members of the UAW fall within this potential class. There is the danger that ultimately the number of members that the UAW can represent will be quite small. The Union may therefore lack the incentive to provide the adequate representation needed by the courts.

It is well settled that an association can represent its members' interest in a third-party action when an association has alleged a related injury. *E. g.*, *Warth* v. *Seldin*, 422 U. S. 490 (1975). Moreover, in appropriate circumstances this Court has conferred standing upon an association whose members have suffered an alleged injury, even though the organization itself has not suffered an injury. In *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333 (1977), the Court stated:

> "[W]e have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.*, at 343.

It is undisputed that achieving unemployment benefits under the program of trade readjustment allowance is "germane" to the UAW's purpose in the sense that one of its goals is to secure such benefits for its workers. I do not believe, however, that a determination of "germane" in this formalistic sense should be sufficient to confer standing upon the UAW here.

A consistent concern of our standing cases has been the adequacy of representation of the organization purportedly acting on behalf of the injured parties, especially when the organization itself has not suffered injury. This Court has repeatedly expressed its reluctance to confer standing on third parties for fear of inadequate representation. "The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them." *Singleton* v. *Wulff,* 428 U. S. 106, 114 (1976) (opinion of BLACKMUN, J.). See, *e. g., Baker* v. *Carr,* 369 U. S. 186, 204 (1962) (standing requirement aimed at "assur[ing] that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends"); *Holden* v. *Hardy,* 169 U. S. 366, 397 (1898) (assertion of third parties' rights would come with "greater cogency" from the third parties themselves).

Since the concept of organizational representation is based on a theoretical identity between the organization and its members, the organization's interest in the outcome is based on the members' stake in the outcome. The number of members in the organization with a concrete stake in the outcome, however, may be so small that this theoretical identity disappears. It may develop in this case, in fact, that the great majority of members in the Union have little or no interest in the litigation. Moreover, a union may have reasons for instituting a suit—such as the publicity that attends a major case—other than to assert rights of its members. In such a case, the "concrete adverseness" required throughout a litigation by our cases may be absent.*

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*It is, of course, true that many organizations have financial resources, expertise, and research ability that individual plaintiffs or ad hoc groups lack. But absent the requisite interest of the organization itself, the presence of these resources does not ensure adequacy of representation. It also may be noted that organizational standing differs in controlling

In the light of these dangers of inadequate representation, I would not find—on the basis of the record before us—that the UAW had standing based on an amorphous and unenumerated group of injured parties. Accordingly, I dissent.

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respects from the typical class action. In the latter, there must be an identity of interests among all plaintiffs before the court—an identity that can be counted upon to assure adequate representation.

MEMPHIS COMMUNITY SCHOOL DISTRICT ET AL. *v.* STACHURA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 85–410. Argued April 2, 1986—Decided June 25, 1986

Respondent, a tenured teacher in the Memphis, Michigan, public schools, was suspended following parents' complaints about his teaching methods in a seventh-grade life science course that included the showing of allegedly sexually explicit pictures and films. While respondent was later reinstated, he, before being reinstated, brought suit in Federal District Court under 42 U. S. C. § 1983 against petitioner School District, Board of Education, Board Members, school administrators, and parents, alleging that his suspension deprived him of liberty and property without due process of law and violated his First Amendment right to academic freedom. He sought both compensatory and punitive damages. The District Court instructed the jury on the standard elements of compensatory and punitive damages and also charged the jury that additional compensatory damages could be awarded based on the value or importance of the constitutional rights that were violated. The jury found petitioners liable, awarding both compensatory and punitive damages. The Court of Appeals affirmed.

Held: Damages based on the abstract "value" or "importance" of constitutional rights are not a permissible element of compensatory damages in § 1983 cases. Pp. 304–313.

(a) The basic purpose of § 1983 damages is "to *compensate persons for injuries* that are caused by the deprivation of constitutional rights." *Carey* v. *Piphus*, 435 U. S. 247, 254. The instructions at issue cannot be squared with *Carey*, or with the principles of tort damages on which *Carey* and § 1983 are grounded. Damages measured by the jury's perception of the abstract "importance" of a constitutional right are not necessary to vindicate the constitutional rights that § 1983 protects, and moreover are an unwieldy tool for ensuring compliance with the Constitution. Pp. 305–310.

(b) Since such damages are wholly divorced from any compensatory purpose, they cannot be justified as presumed damages, which are a *substitute* for ordinary compensatory damages, not a *supplement* for an award that fully compensates the alleged injury. Pp. 310–312.

(c) The erroneous instructions were not harmless error where the verdict did not specify how much of the compensatory damages was designed to compensate respondent for his injury and how much reflected the jury's estimation of the value of the constitutional rights that were infringed. Pp. 312–313.

763 F. 2d 211, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BRENNAN and STEVENS, JJ., filed a separate statement, *post*, p. 313. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 313.

Patrick J. Berardo argued the cause and filed briefs for petitioners.

Jeffrey A. Heldt argued the cause for respondent. With him on the brief was *Erwin B. Ellmann*.*

JUSTICE POWELL delivered the opinion of the Court.

This case requires us to decide whether 42 U. S. C. § 1983 authorizes an award of compensatory damages based on the factfinder's assessment of the value or importance of a substantive constitutional right.

I

Respondent Edward Stachura is a tenured teacher in the Memphis, Michigan, public schools. When the events that led to this case occurred, respondent taught seventh-grade life science, using a textbook that had been approved by the School Board. The textbook included a chapter on human reproduction. During the 1978–1979 school year, respondent spent six weeks on this chapter. As part of their instruction, students were shown pictures of respondent's wife dur-

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**Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Geller, Bruce N. Kuhlik*, and *Barbard L. Herwig* filed a brief for the United States as *amicus curiae* urging reversal.

Charles S. Sims and *Stuart H. Singer* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

Gwendolyn H. Gregory, August W. Steinhilber, and *Thomas A. Shannon* filed a brief for the National School Boards Association as *amicus curiae*.

ing her pregnancy. Respondent also showed the students two films concerning human growth and sexuality. These films were provided by the County Health Department, and the Principal of respondent's school had approved their use. Both films had been shown in past school years without incident.

After the showing of the pictures and the films, a number of parents complained to school officials about respondent's teaching methods. These complaints, which appear to have been based largely on inaccurate rumors about the allegedly sexually explicit nature of the pictures and films, were discussed at an open School Board meeting held on April 23, 1979. Following the advice of the School Superintendent, respondent did not attend the meeting, during which a number of parents expressed the view that respondent should not be allowed to teach in the Memphis school system.[1] The day after the meeting, respondent was suspended with pay. The School Board later confirmed the suspension, and notified respondent that an "administration evaluation" of his teaching methods was underway. No such evaluation was ever made. Respondent was reinstated the next fall, after filing this lawsuit.

Respondent sued the School District, the Board of Education, various Board members and school administrators, and two parents who had participated in the April 23 School Board meeting. The complaint alleged that respondent's suspension deprived him of both liberty and property without due process of law and violated his First Amendment right to

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[1] One member of the School Board described the meeting as follows:

"At this time, the public was in a total uproar and completely out of control. . . . People were hollering and shouting and the statement was made from the public that if Mr. Stachura was allowed to return in the morning, they would be there to picket the school.

"At this point of total panic, [the School Superintendent] stated in order to maintain peace in our school district, we would suspend Mr. Stachura with full pay and get this mess straightened out." Tr. 583–584, quoted in *Stachura* v. *Truszkowski*, 763 F. 2d 211, 214 (CA6 1985).

academic freedom. Respondent sought compensator
punitive damages under 42 U. S. C. § 1983 for these co
tional violations.

At the close of trial on these claims, the District Co
structed the jury as to the law governing the asserted
for liability. Turning to damages, the court instructe
jury that on finding liability it should award a suf
amount to compensate respondent for the injury caus
petitioners' unlawful actions:

> "You should consider in this regard any lost ear
> loss of earning capacity; out-of-pocket expenses; a
> mental anguish or emotional distress that you fi
> Plaintiff to have suffered as a result of conduct b
> Defendants depriving him of his civil rights." Ap

In addition to this instruction on the standard eleme
compensatory damages, the court explained that pu
damages could be awarded, and described the standard
erning punitive awards.[2] Finally, at respondent's re
and over petitioners' objection, the court charged that
ages also could be awarded based on the value or impo
of the constitutional rights that were violated:

> "If you find that the Plaintiff has been deprive
> Constitutional right, you may award damages to
> pensate him for the deprivation. Damages for thi
> of injury are more difficult to measure than damag
> a physical injury or injury to one's property. The
> no medical bills or other expenses by which yo
> judge how much compensation is appropriate. I
> sense, no monetary value we place upon Constitu
> rights can measure their importance in our socie
> compensate a citizen adequately for their depriv
> However, just because these rights are not capa

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[2] Petitioners do not challenge the award of punitive damages i
Court.

> precise evaluation does not mean that an appropriate monetary amount should not be awarded.
>
> "The precise value you place upon any Constitutional right which you find was denied to Plaintiff is within your discretion. You may wish to consider the importance of the right in our system of government, the role which this right has played in the history of our republic, [and] the significance of the right in the context of the activities which the Plaintiff was engaged in at the time of the violation of the right." *Id.*, at 96.

The jury found petitioners liable,[3] and awarded a total of $275,000 in compensatory damages and $46,000 in punitive damages.[4] The District Court entered judgment notwithstanding the verdict as to one of the defendants, reducing the total award to $266,750 in compensatory damages and $36,000 in punitive damages.

In an opinion devoted primarily to liability issues, the Court of Appeals for the Sixth Circuit affirmed, holding that respondent's suspension had violated both procedural due process and the First Amendment. *Stachura* v. *Truszkowski*, 763 F. 2d 211 (1985). Responding to petitioners' contention that the District Court improperly authorized damages based solely on the value of constitutional rights, the court noted only that "there was ample proof of actual injury to plaintiff Stachura both in his effective discharge . . . and by the damage to his reputation and to his professional career as a teacher. Contrary to the situation in *Carey* v. *Piphus*, 435 U. S. 247 (1978) . . . , there was proof from which the jury could have found, as it did, actual and important damages." *Id.*, at 214.

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[3] The jury found petitioners liable based both on the alleged deprivation of procedural due process and on the alleged violation of respondent's First Amendment rights.

[4] The bulk of the award was against the School Board, which was assessed $233,750 in compensatory damages. Three of the individual defendants were each assessed $8,250, while six others were each charged $2,750. Nine individual defendants were assessed punitive damages, ranging from $1,000 to $15,000.

We granted certiorari limited to the question whether the Court of Appeals erred in affirming the damages award in the light of the District Court's instructions that authorized not only compensatory and punitive damages, but also damages for the deprivation of "any constitutional right."[5] 474 U. S. 918 (1985). We reverse, and remand for a new trial limited to the issue of compensatory damages.

II

Petitioners challenge the jury instructions authorizing damages for violation of constitutional rights on the ground that those instructions permitted the jury to award damages based on its own unguided estimation of the value of such rights.[6] Respondent disagrees with this characterization of the jury instructions, contending that the compensatory damages instructions taken as a whole focused solely on respondent's injury and not on the abstract value of the rights he asserted.

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[5] Since our decision in *Carey* v. *Piphus*, 435 U. S. 247 (1978), several of the Courts of Appeals have concluded that damages awards based on the abstract value of constitutional rights are proper, at least as long as the right in question is substantive. *E. g., Bell* v. *Little Axe Independent School Dist. No. 70*, 766 F. 2d 1391 (CA10 1985); *Herrera* v. *Valentine*, 653 F. 2d 1220, 1227–1229 (CA8 1981); *Konczak* v. *Tyrrell*, 603 F. 2d 13, 17 (CA7 1979) (dicta), cert. denied, 444 U. S. 1016 (1980). See also Love, Damages: A Remedy for the Violation of Constitutional Rights, 67 Calif. L. Rev. 1242 (1979). Other courts have determined that our reasoning in *Carey* forecloses such awards. *E. g., Hobson* v. *Wilson*, 237 U. S. App. D. C. 219, 278–279, 737 F. 2d 1, 60–61 (1984), cert. denied, 470 U. S. 1084 (1985); *Familias Unidas* v. *Briscoe*, 619 F. 2d 391, 402 (CA5 1980); *Davis* v. *Village Park II Realty Co.*, 578 F. 2d 461, 463 (CA2 1978). Cf. *Freeman* v. *Franzen*, 695 F. 2d 485, 492–494 (CA7 1982), cert. denied, 463 U. S. 1214 (1983).

[6] Respondent argues that petitioners did not preserve their challenge to the jury instructions below. Petitioners' counsel expressly objected to the authorization of damages based on the value of constitutional rights, on the ground that such damages were impermissible under *Carey* v. *Piphus*, *supra*, and on the ground that they required the jury to "speculate as to what the value of the Constitutional right is." App. 97–98. The District Court responded by stating that it relied on *Herrera* v. *Valentine*, *supra*, at 1227, and on *Corriz* v. *Naranjo*, 667 F. 2d 892 (CA10), cert. dism'd, 458 U. S. 1123 (1982). App. 98. Both of those cases held that jury instruc-

We believe petitioners more accurately characterize the instructions. The damages instructions were divided into three distinct segments: (i) compensatory damages for harm to respondent, (ii) punitive damages, and (iii) additional "compensat[ory]" damages for violations of constitutional rights. No sensible juror could read the third of these segments to modify the first.[7] On the contrary, the damages instructions plainly authorized—in addition to punitive damages—two distinct types of "compensatory" damages: one based on respondent's actual injury according to ordinary tort law standards, and another based on the "value" of certain rights. We therefore consider whether the latter category of damages was properly before the jury.

III

A

We have repeatedly noted that 42 U. S. C. § 1983[8] creates "'a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them

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tions similar to those used here were permissible under *Carey*. This exchange satisfies us that counsel for petitioners "stat[ed] distinctly the matter to which he object[ed] and the grounds of his objection," Fed. Rule Civ. Proc. 51, and that the District Court understood the objection.

[7] The jurors were given written copies of the instructions for use in their deliberations. App. 96.

[8] Section 1983 reads:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

by the Constitution." *Carey* v. *Piphus*, 435 U. S. 247 (1978), quoting *Imbler* v. *Pachtman*, 424 U. S. 409, (1976). See also *Smith* v. *Wade*, 461 U. S. 30, 34 (1 *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 258 (1981). Accordingly, when § 1983 plaintiffs seek damag violations of constitutional rights, the level of damages dinarily determined according to principles derived fro common law of torts. See *Smith* v. *Wade*, *supra*, a *Carey* v. *Piphus*, *supra*, at 257–258; cf. *Monroe* v. *Pape* U. S. 167, 196, and n. 5 (1961) (Harlan, J., concurring).

Punitive damages aside,[9] damages in tort cases ar signed to provide "*compensation* for the injury caus plaintiff by defendant's breach of duty." 2 F. Harpe James, & O. Gray, Law of Torts § 25.1, p. 490 (2d ed. (emphasis in original), quoted in *Carey* v. *Piphus*, *sup* 255. See also *Bivens* v. *Six Unknown Federal Nar* *Agents*, 403 U. S. 388, 395, 397 (1971); *id.*, at 408–409 lan, J., concurring in judgment). To that end, compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as "impairment of reputation . . . , personal humiliation, and mental anguish and suffering." *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 350 (1974). See also *Carey* v. *Piphus*, *supra*, at 264 (mental and emotional distress constitute compensable injury in § 1983 cases). Deterrence is also an important purpose of this system, but it operates through the mechanism of damages that are *compensatory*—damages grounded in determinations of plaintiffs' actual losses. *E. g.*, 4 Harper, James, & Gray, *supra*, § 25.3 (discussing need for certainty in damages determinations); D. Dobbs, Law of Remedies § 3.1, pp. 135–136 (1973). Congress adopted this common-law system of recovery when it established liability for "constitutional torts."[10] Consequently, "the basic purpose" of § 1983 damages is "to *compensate persons for injuries* that are caused by the deprivation of constitutional rights." *Carey* v. *Piphus*, 435 U. S., at 254 (emphasis added). See also *id.*, at 257 ("damages awards under § 1983 should be governed by the principle of compensation").

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[9] The purpose of punitive damages is to punish the defendant f willful or malicious conduct and to deter others from similar beh *E. g.*, Restatement (Second) of Torts § 908(1) (1979); W. Keeton, D. D R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 9 (5 1984); C. McCormick, Law of Damages 275 (1935). See also *Ele* *Workers* v. *Foust*, 442 U. S. 42, 48 (1979); *Gertz* v. *Robert Welch*, 418 U. S. 323, 350 (1974). In *Smith* v. *Wade*, 461 U. S. 30 (198 Court held that punitive damages may be available in a proper § 198 As the punitive damages instructions used in this case explained, ho such damages are available only on a showing of the requisite App. 94–95 (authorizing punitive damages for acts "maliciously, o tonly, or oppressively done"); *Smith* v. *Wade*, *supra*, at 51.

Respondent does not, and could not reasonably, contend that the rate instructions authorizing damages for violation of constitutional were equivalent to punitive damages instructions. In these se instructions, the jury was authorized to find damages for constitu violations without any finding of malice or ill will. Moreover, th instructions separately authorized punitive damages, and the D Court expressly labeled the "constitutional rights" damages compens The instructions concerning damages for constitutional violations ar impermissible unless they reasonably could be read as authorizing *co* *satory* damages.

Carey v. *Piphus* represents a straightforward application of these principles. *Carey* involved a suit by a high school student suspended for smoking marijuana; the student claimed that he was denied procedural due process because he was suspended without an opportunity to respond to the charges against him. The Court of Appeals for the Seventh Circuit held that even if the suspension was justified, the student could recover substantial compensatory damages simply because of the insufficient procedures used to suspend him from school. We reversed, and held that the student could recover compensatory damages only if he proved actual injury caused by the denial of his constitutional rights. *Id.*, at 264. We noted: "Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect perso from injuries to particular interests . . . ." *Id.*, at 25 Where no injury was present, no "compensatory" damag could be awarded.

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[10] See generally Whitman, Constitutional Torts, 79 Mich. L. Rev. 5 (1980).

The instructions at issue here cannot be squared wi *Carey*, or with the principles of tort damages on which *Car* and § 1983 are grounded. The jurors in this case were to that, in determining how much was necessary to "compensa [respondent] for the deprivation" of his constitutional right they should place a money value on the "rights" themselv by considering such factors as the particular right's "impo tance . . . in our system of government," its role in Americ history, and its "significance . . . in the context of the activ ties" in which respondent was engaged. App. 96. Thes factors focus, not on compensation for provable injury, but o the jury's subjective perception of the importance of constitu tional rights as an abstract matter. *Carey* establishes tha such an approach is impermissible. The constitutional righ transgressed in *Carey*—the right to due process of law—i central to our system of ordered liberty. See *In re Gaul* 387 U. S. 1, 20–21 (1967). We nevertheless held that *n* compensatory damages could be awarded for violation of tha right absent proof of actual injury. *Carey*, 435 U. S., at 26 *Carey* thus makes clear that the abstract value of a constitu tional right may not form the basis for § 1983 damages.[11]

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[11] We did approve an award of nominal damages for the deprivation o due process in *Carey*. 435 U. S., at 266. Our discussion of that issu makes clear that nominal damages, and not damages based on some unde finable "value" of infringed rights, are the appropriate means of "vindicat ing" rights whose deprivation has not caused actual, provable injury:

"Common-law courts traditionally have vindicated deprivations of cer tain 'absolute' rights that are not shown to have caused actual injur through the award of a nominal sum of money. By making the deprivatio of such rights actionable for nominal damages without proof of actual in jury, the law recognizes the importance to organized society that thos rights be scrupulously observed; but at the same time, it remains true t the principle that substantial damages should be awarded only to compen

Respondent nevertheless argues that *Carey* does not control here, because in this case a *substantive* constitutional right—respondent's First Amendment right to academic freedom[12]—was infringed. The argument misperceives our analysis in *Carey*. That case does not establish a two-tiered system of constitutional rights, with substantive rights afforded greater protection than "mere" procedural safeguards. We did acknowledge in *Carey* that "the elements and prerequisites for recovery of damages" might vary depending on the interests protected by the constitutional right at issue. *Id.*, at 264–265. But we emphasized that, whatever the constitutional basis for § 1983 liability, such damages must always be designed "to *compensate injuries* caused by the [constitutional] deprivation." *Id.*, at 265 (emphasis added).[13] See also *Hobson* v. *Wilson*, 237 U. S. App. D. C. 219, 277–279, 737 F. 2d 1, 59–61 (1984), cert. denied, 470 U. S. 1084 (1985); cf. *Smith* v. *Wade*, 461 U. S. 30 (1983). That conclusion simply leaves no room for noncompensatory

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sate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights." *Ibid.* (footnote omitted).

[12] Our grant of certiorari in this case does not encompass the question whether respondent stated or proved a claim under either the Due Process Clause or the First Amendment. We therefore treat the Court of Appeals' decision on all liability issues as final for purposes of our decision.

[13] *Carey* recognized that "the task . . . of adapting common-law rules of damages to provide fair compensation for injuries caused by the deprivation of a constitutional right" is one "of some delicacy." *Id.*, at 258. We also noted that "the elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another." *Id.*, at 264–265. See also *Hobson* v. *Wilson*, 237 U. S. App. D. C., at 279–281, 737 F. 2d, at 61–63. This "delicate" task need not be undertaken here. None of the parties challenges the portion of the jury instructions that permitted recovery for actual harm to respondent, and the instructions that *are* challenged simply do not authorize compensation for injury. We therefore hold only that damages based on the "value" or "importance" of constitutional rights are not authorized by § 1983, because they are not truly compensatory.

damages measured by the jury's perception of the abstra “importance” of a constitutional right.

Nor do we find such damages necessary to vindicate t constitutional rights that § 1983 protects. See n. 11, *supr* Section 1983 presupposes that damages that compensate f actual harm ordinarily suffice to deter constitutional viol tions. *Carey*, *supra*, at 256–257 (“To the extent that Co gress intended that awards under § 1983 should deter t deprivation of constitutional rights, there is no evidence th it meant to establish a deterrent more formidable than th inherent in the award of compensatory damages”). Mor over, damages based on the “value” of constitutional righ are an unwieldy tool for ensuring compliance with the Co stitution. History and tradition do not afford any sound gui ance concerning the precise value that juries should place o constitutional protections. Accordingly, were such damage available, juries would be free to award arbitrary amount without any evidentiary basis, or to use their unbounde discretion to punish unpopular defendants. Cf. *Gertz*, 41 U. S., at 350. Such damages would be too uncertain to be o any great value to plaintiffs, and would inject caprice int determinations of damages in § 1983 cases. We therefor hold that damages based on the abstract “value” or “impor tance” of constitutional rights are not a permissible elemen of compensatory damages in such cases.

B

Respondent further argues that the challenged instructions authorized a form of “presumed” damages—a remedy that is both compensatory in nature and traditionally part of the range of tort law remedies. Alternatively, respondent argues that the erroneous instructions were at worst harmless error.

Neither argument has merit. Presumed damages are a *substitute* for ordinary compensatory damages, not a *supplement* for an award that fully compensates the alleged injury. When a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish, some form of presumed damages may possibly be appropriate. See *Carey*, 435 U. S., at 262; cf. *Dun & Bradstreet, Inc.* v. *Greenmoss Builders*, 472 U. S. 749, 760–761 (1985) (opinion of POWELL, J.); *Gertz* v. *Robert Welch, Inc.*, *supra*, at 349. In those circumstances, presumed damages may roughly approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure. As we earlier explained, the instructions at issue in this case did not serve this purpose, but instead called on the jury to measure damages based on a subjective evaluation of the importance of particular constitutional values. Since such damages are wholly divorced from any compensatory purpose, they cannot be justified as presumed damages.[14]

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[14] For the same reason, *Nixon* v. *Herndon*, 273 U. S. 536 (1927), and similar cases do not support the challenged instructions. In *Nixon*, the Court held that a plaintiff who was illegally prevented from voting in a state primary election suffered compensable injury. Accord, *Lane* v. *Wilson*, 307 U. S. 268 (1939). This holding did not rest on the "value" of the right to vote as an abstract matter; rather, the Court recognized that the plaintiff had suffered a particular injury—his inability to vote in a particular election—that might be compensated through substantial money damages. See 273 U. S., at 540 ("the petition . . . seeks to recover for private damage").

Nixon followed a long line of cases, going back to Lord Holt's decision in *Ashby* v. *White*, 2 Ld. Raym. 938, 92 Eng. Rep. 126 (1703), authorizing substantial money damages as compensation for persons deprived of their right to vote in particular elections. *E. g.*, *Wiley* v. *Sinkler*, 179 U. S. 58, 65 (1900); *Wayne* v. *Venable*, 260 F. 64, 66 (CA8 1919). Although these decisions sometimes speak of damages for the value of the right to vote, their analysis shows that they involve nothing more than an award of presumed damages for a nonmonetary harm that cannot easily be quantified:

> "In the eyes of the law th[e] right [to vote] is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing, and the amount of the damages is a question peculiarly appropriate for the determination of the jury, because each member of the jury has personal knowledge of the value of the right." *Ibid.*

See also *Ashby* v. *White*, *supra*, at 955, 92 Eng. Rep., at 137 (Holt, C. J.) ("As in an action for slanderous words, though a man does not lose a penny

Moreover, no rough substitute for compensatory damag was required in this case, since the jury was fully authoriz to compensate respondent for both monetary and nonmon tary harms caused by petitioners' conduct.

Nor can we find that the erroneous instructions we harmless. See 28 U. S. C. § 2111; *McDonough Power Equi ment, Inc.* v. *Greenwood*, 464 U. S. 548 (1984). When da ages instructions are faulty and the verdict does not reve the means by which the jury calculated damages, "[the] err in the charge is difficult, if not impossible, to correct witho retrial, in light of the jury's general verdict." *Newport Fact Concerts, Inc.*, 453 U. S., at 256, n. 12. The jury wa authorized to award three categories of damages: (i) compe satory damages for injury to respondent, (ii) punitive dam ages, and (iii) damages based on the jury's perception of th "importance" of two provisions of the Constitution. Th submission of the third of these categories was error. A though the verdict specified an amount for punitive damage it did not specify how much of the remaining damages wa designed to compensate respondent for his injury and ho much reflected the jury's estimation of the value of the con stitutional rights that were infringed. The effect of the erro neous instruction is therefore unknowable, although probabl significant: the jury awarded respondent a very substantia amount of damages, none of which could have derived from any monetary loss.[15] It is likely, although not certain, that

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by reason of the speaking [of] them, yet he shall have an action"). The "value of the right" in the context of these decisions is the money value of the particular loss that the plaintiff suffered—a loss of which "each member of the jury has personal knowledge." It is *not* the value of the right to vote as a general, abstract matter, based on its role in our history or system of government. Thus, whatever the wisdom of these decisions in the context of the changing scope of compensatory damages over the course of this century, they do not support awards of noncompensatory damages such as those authorized in this case.

[15] Throughout his suspension, respondent continued to receive his teacher's salary.

major part of these damages was intended to "compensate" respondent for the abstract "value" of his due process and First Amendment rights. For these reasons, the case must be remanded for a new trial on compensatory damages.

IV

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN and JUSTICE STEVENS join the opinion of the Court and also join JUSTICE MARSHALL's opinion concurring in the judgment.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in the judgment.

I agree with the Court that this case must be remanded for a new trial on damages. Certain portions of the Court's opinion, however, can be read to suggest that damages in § 1983 cases are necessarily limited to "out-of-pocket loss," "other monetary harms," and "such injuries as 'impairment of reputation . . . , personal humiliation, and mental anguish and suffering.'" See *ante*, at 307. I do not understand the Court so to hold, and I write separately to emphasize that the violation of a constitutional right, in proper cases, may itself constitute a compensable injury.

The appropriate starting point of any analysis in this area is this Court's opinion in *Carey* v. *Piphus*, 435 U. S. 247 (1978). In *Carey*, we recognized that "the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights." *Id.*, at 254; see *ante*, at 306–307. We explained, however, that application of that principle to concrete cases was not a

simple matter. 435 U. S., at 257. "It is not clear," w
stated, "that common-law tort rules of damages will provi
a complete solution to the damages issue in every § 19
case." *Id.*, at 258. Rather, "the rules governing compens
tion for injuries caused by the deprivation of constitution
rights should be tailored to the interests protected by th
particular right in question—just as the common-law rules
damages themselves were defined by the interests protecte
in various branches of tort law." *Id.*, at 259.

Applying those principles, we held in *Carey* that substa
tial damages should not be awarded where a plaintiff ha
been denied procedural due process but has made no furthe
showing of compensable damage. We repeated, howeve
that "the elements and prerequisites for recovery of damage
appropriate to compensate injuries caused by the deprivatio
of one constitutional right are not necessarily appropriate t
compensate injuries caused by the deprivation of another.
Id., at 264–265. We referred to cases that support th
award of substantial damages simply upon a showing that
plaintiff was wrongfully deprived of the right to vote, with
out requiring any further demonstration of damages. *Id.*, a
264–265, n. 22.

Following *Carey*, the Courts of Appeals have recognize
that invasions of constitutional rights sometimes cause in
juries that cannot be redressed by a wooden application o
common-law damages rules.* In *Hobson* v. *Wilson*, 23
U. S. App. D. C. 219, 275–281, 737 F. 2d 1, 57–63 (1984)
cert. denied, 470 U. S. 1084 (1985), which the Court cites
ante, at 309, and n. 13, plaintiffs claimed that defendant Federal Bureau of Investigation agents had invaded their First

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*See, *e.g.*, *Bell* v. *Little Axe Independent School District No. 70 o*
Cleveland Cty., 766 F. 2d 1391, 1408–1413 (CA10 1985); *Hobson* v. *Wilson*,
237 U. S. App. D. C. 219, 275–281, 737 F. 2d 1, 57–63 (1984), cert. denied,
470 U. S. 1084 (1985); *Kincaid* v. *Rusk*, 670 F. 2d 737, 745–746 (CA7 1982);
Mickens v. *Winston*, 462 F. Supp. 910, 913 (ED Va. 1978), summarily aff'd,
609 F. 2d 508 (CA4 1979).

Amendment rights to assemble for peaceable political protest, to associate with others to engage in political expression, and to speak on public issues free of unreasonable government interference. The District Court found that the defendants had succeeded in diverting plaintiffs from, and impeding them in, their protest activities. The Court of Appeals for the District of Columbia Circuit held that that injury to a First Amendment-protected interest could itself constitute compensable injury wholly apart from any "emotional distress, humiliation and personal indignity, emotional pain, embarassment, fear, anxiety and anguish" suffered by plaintiffs. 237 U. S. App. D. C., at 280, 737 F. 2d, at 62 (footnotes omitted). The court warned, however, that that injury could be compensated with substantial damages only to the extent that it was "reasonably quantifiable"; damages should not be based on "the so-called inherent value of the rights violated." *Ibid.*

I believe that the *Hobson* court correctly stated the law. When a plaintiff is deprived, for example, of the opportunity to engage in a demonstration to express his political views, "[i]t is facile to suggest that no damage is done." *Dellums* v. *Powell*, 184 U. S. App. D. C. 275, 303, 566 F. 2d 167, 195 (1977). Loss of such an opportunity constitutes loss of First Amendment rights " 'in their most pristine and classic form.' " *Ibid.*, quoting *Edwards* v. *South Carolina*, 372 U. S. 229, 235 (1963). There is no reason why such an injury should not be compensable in damages. At the same time, however, the award must be proportional to the actual loss sustained.

The instructions given the jury in this case were improper because they did not require the jury to focus on the loss actually sustained by respondent. Rather, they invited the jury to base its award on speculation about "the importance of the right in our system of government" and "the role which this right has played in the history of our republic," guided only by the admonition that "[i]n one sense, no monetary value we place on Constitutional rights can measure their importance in our society or compensate a citizen adequately fo their deprivation." App. 96. These instructions invited th jury to speculate on matters wholly detached from the rea injury occasioned respondent by the deprivation of the right Further, the instructions might have led the jury to grant respondent damages based on the "abstract value" of the righ to procedural due process—a course directly barred by ou decision in *Carey*.

The Court therefore properly remands for a new trial o damages. I do not understand the Court, however, to hol that deprivations of constitutional rights can never themselves constitute compensable injuries. Such a rule woul be inconsistent with the logic of *Carey*, and would defeat th purpose of § 1983 by denying compensation for genuine injuries caused by the deprivation of constitutional rights.

CELOTEX CORP. *v.* CATRETT, ADMINISTRATRIX OF THE ESTATE OF CATRETT

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-198. Argued April 1, 1986—Decided June 25, 1986

In September 1980, respondent administratrix filed this wrongful-death action in Federal District Court, alleging that her husband's death in 1979 resulted from his exposure to asbestos products manufactured or distributed by the defendants, who included petitioner corporation. In September 1981, petitioner filed a motion for summary judgment, asserting that during discovery respondent failed to produce any evidence to support her allegation that the decedent had been exposed to petitioner's products. In response, respondent produced documents tending to show such exposure, but petitioner argued that the documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion. In July 1982, the court granted the motion because there was no showing of exposure to petitioner's products, but the Court of Appeals reversed, holding that summary judgment in petitioner's favor was precluded because of petitioner's failure to support its motion with evidence tending to *negate* such exposure, as required by Federal Rule of Civil Procedure 56(e) and the decision in *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144.

Held:

1. The Court of Appeals' position is inconsistent with the standard for summary judgment set forth in Rule 56(c), which provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Pp. 322-326.

(a) The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. Pp. 322–323.

(b) There is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to the affidavits, "if any," suggests the absence of such a requirement, and Rules 56(a) and (b) provide that claimants and defending parties may move for summary judgment "with or without supporting affidavits." Rule 56(e), which relates to the form and use of affidavits and other materials, does not require that the moving party's motion always be supported by affidavits to show initially the absence of a genuine issue for trial. *Adickes* v. *S. H. Kress & Co.*, *supra*, explained. Pp. 323–326.

(c) No serious claim can be made that respondent was "railroaded" by a premature motion for summary judgment, since the motion was not filed until one year after the action was commenced and since the parties had conducted discovery. Moreover, any potential problem with such premature motions can be adequately dealt with under Rule 56(f). P. 326.

2. The questions whether an adequate showing of exposure to petitioner's products was in fact made by respondent in opposition to the motion, and whether such a showing, if reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial, should be determined by the Court of Appeals in the first instance. Pp. 326–327.

244 U. S. App. D. C. 160, 756 F. 2d 181, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which WHITE, MARSHALL, POWELL, and O'CONNOR, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 328. BRENNAN, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN, J., joined, *post*, p. 329. STEVENS, J., filed a dissenting opinion, *post*, p. 337.

Leland S. Van Koten argued the cause for petitioner. With him on the briefs were *H. Emslie Parks* and *Drake C. Zaharris*.

Paul March Smith argued the cause for respondent. With him on the brief were *Joseph N. Onek*, *Joel I. Klein*, *James F. Green*, and *Peter T. Enslein*.*

**Stephen M. Shapiro*, *Robert L. Stern*, *William H. Crabtree*, *Edward P. Good*, and *Paul M. Bator* filed a brief for the Motor Vehicle Manufacturers Association et al. as *amici curiae* urging reversal.

JUSTICE REHNQUIST delivered the opinion of the Court.

The United States District Court for the District of Columbia granted the motion of petitioner Celotex Corporation for summary judgment against respondent Catrett because the latter was unable to produce evidence in support of her allegation in her wrongful-death complaint that the decedent had been exposed to petitioner's asbestos products. A divided panel of the Court of Appeals for the District of Columbia Circuit reversed, however, holding that petitioner's failure to support its motion with evidence tending to *negate* such exposure precluded the entry of summary judgment in its favor. *Catrett* v. *Johns-Manville Sales Corp.*, 244 U. S. App. D. C. 160, 756 F. 2d 181 (1985). This view conflicted with that of the Third Circuit in *In re Japanese Electronic Products*, 723 F. 2d 238 (1983), rev'd on other grounds *sub nom. Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574 (1986).[1] We granted certiorari to resolve the conflict, 474 U. S. 944 (1985), and now reverse the decision of the District of Columbia Circuit.

Respondent commenced this lawsuit in September 1980, alleging that the death in 1979 of her husband, Louis H. Catrett, resulted from his exposure to products containing asbestos manufactured or distributed by 15 named corporations. Respondent's complaint sounded in negligence, breach of warranty, and strict liability. Two of the defendants filed motions challenging the District Court's *in personam* jurisdiction, and the remaining 13, including petitioner, filed motions for summary judgment. Petitioner's motion, which was first filed in September 1981, argued that summary judgment was proper because respondent had "failed to produce evidence that any [Celotex] product . . . was the proximate cause of the injuries alleged within the jurisdictional limits of [the District] Court." In particular, petitioner noted that respondent had failed to identify, in answering interrogatories specifically requesting such information, any witnesses who could testify about the decedent's exposure to petitioner's asbestos products. In response to petitioner's summary judgment motion, respondent then produced three documents which she claimed "demonstrate that there is a genuine material factual dispute" as to whether the decedent had ever been exposed to petitioner's asbestos products. The three documents included a transcript of a deposition of the decedent, a letter from an official of one of the decedent's former employers whom petitioner planned to call as a trial witness, and a letter from an insurance company to respondent's attorney, all tending to establish that the decedent had been exposed to petitioner's asbestos products in Chicago during 1970–1971. Petitioner, in turn, argued that the three documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion.

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[1] Since our grant of certiorari in this case, the Fifth Circuit has rendered a decision squarely rejecting the position adopted here by the District of Columbia Circuit. See *Fontenot* v. *Upjohn Co.*, 780 F. 2d 1190 (1986).

In July 1982, almost two years after the commencement of the lawsuit, the District Court granted all of the motions filed by the various defendants. The court explained that it was granting petitioner's summary judgment motion because "there [was] no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period." App. 217.[2] Re-

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[2] JUSTICE STEVENS, in dissent, argues that the District Court granted summary judgment only because respondent presented no evidence that the decedent was exposed to Celotex asbestos products *in the District of Columbia*. See *post*, at 338–339. According to JUSTICE STEVENS, we should affirm the decision of the Court of Appeals, reversing the District Court, on the "narrower ground" that respondent "made an adequate showing" that the decedent was exposed to Celotex asbestos products in Chicago during 1970–1971. See *ibid.*

JUSTICE STEVENS' position is factually incorrect. The District Court expressly stated that respondent had made no showing of exposure to Celotex asbestos products "in the District of Columbia *or elsewhere*." App. 217 (emphasis added). Unlike JUSTICE STEVENS, we assume that spondent appealed only the grant of summary judgment in favor of petitioner, and a divided panel of the District of Columbia Circuit reversed. The majority of the Court of Appeals held that petitioner's summary judgment motion was rendered "fatally defective" by the fact that petitioner "made no effort to adduce *any* evidence, in the form of affidavits or otherwise, to support its motion." 244 U. S. App. D. C., at 163, 756 F. 2d, at 184 (emphasis in original). According to the majority, Rule 56(e) of the Federal Rules of Civil Procedure,[3] and this Court's decision in *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 159 (1970), establish that "the party opposing the motion for summary judgment bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." 244 U. S. App. D. C., at 163, 756

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the District Court meant what it said. The majority of the Court of Appeals addressed the very issue raised by JUSTICE STEVENS, and decided that "[t]he District Court's grant of summary judgment must therefore have been based on its conclusion that there was 'no showing that the plaintiff was exposed to defendant Celotex's product in the District of Columbia *or elsewhere* within the statutory period.'" *Catrett* v. *Johns-Manville Sales Corp.*, 244 U. S. App. D. C. 160, 162, n. 3, 756 F. 2d 181, 183, n. 3 (1985) (emphasis in original). In other words, no judge involved in this case to date shares JUSTICE STEVENS' view of the District Court's decision.

[3] Rule 56(e) provides:

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

F. 2d, at 184 (emphasis in original; footnote omitted). The majority therefore declined to consider petitioner's argument that none of the evidence produced by respondent in opposition to the motion for summary judgment would have been admissible at trial. *Ibid.* The dissenting judge argued that "[t]he majority errs in supposing that a party seeking summary judgment must always make an affirmative evidentiary showing, even in cases where there is not a triable, factual dispute." *Id.*, at 167, 756 F. 2d, at 188 (Bork, J., dissenting). According to the dissenting judge, the majority's decision "undermines the traditional authority of trial judges to grant summary judgment in meritless cases." *Id.*, at 166, 756 F. 2d, at 187.

We think that the position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure.[4] Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . ." *Anderson* v. *Liberty Lobby, Inc., ante,* at 250.

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[4] Rule 56(c) provides:

"The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to "the affidavits, *if any*" (emphasis added), suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide that claimants and defendants, respectively, may move for summary judgment "*with or without supporting affidavits*" (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.[5]

Respondent argues, however, that Rule 56(e), by its terms, places on the nonmoving party the burden of coming forward with rebuttal affidavits, or other specified kinds of materials, only in response to a motion for summary judgment "made and supported as provided in this rule." According to respondent's argument, since petitioner did not "support" its motion with affidavits, summary judgment was improper in this case. But as we have already explained, a motion for summary judgment may be made pursuant to Rule 56 "with or without supporting affidavits." In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.

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[5] See Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L. J. 745, 752 (1974); Currie, Thoughts on Directed Verdicts and Summary Judgments, 45 U. Chi. L. Rev. 72, 79 (1977).

The Court of Appeals in this case felt itself constrained, however, by language in our decision in *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970). There we held that summary judgment had been improperly entered in favor of the defendant restaurant in an action brought under 42 U. S. C. § 1983. In the course of its opinion, the *Adickes* Court said that "both the commentary on and the background of the 1963 amendment conclusively show that it was not intended to modify the burden of the moving party . . . to show initially the absence of a genuine issue concerning any material fact." *Id.*, at 159. We think that this statement is accurate in a literal sense, since we fully agree with the *Adickes* Court that the 1963 amendment to Rule 56(e) was not designed to modify the burden of making the showing generally required by Rule 56(c). It also appears to us that, on the basis of the showing before the Court in *Adickes*, the motion for summary judgment in that case should have been denied. But we do not think the *Adickes* language quoted above should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, the burden on the moving party may be discharged by "showing"—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.

The last two sentences of Rule 56(e) were added, as this Court indicated in *Adickes*, to disapprove a line of cases allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings. While the *Adickes* Court was undoubtedly correct in concluding that these two sentences were not intended to *reduce* the burden of the moving party, it is also obvious that they were not adopted to *add to* that burden. Yet that is exactly the result which the reasoning of the Court of Appeals would produce; in effect, an amendment to Rule 56(e) designed to *facilitate* the granting of motions for summary judgment would be interpreted to make it *more difficult* to grant such motions. Nothing in the two sentences themselves requires this result, for the reasons we have previously indicated, and we now put to rest any inference that they do so.

Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence. See 244 U. S. App. D. C., at 167–168, 756 F. 2d, at 189 (Bork, J., dissenting); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2720, pp. 28–29 (1983). It would surely defy common sense to hold that the District Court could have entered summary judgment *sua sponte* in favor of petitioner in the instant case, but that petitioner's filing of a motion requesting such a disposition precluded the District Court from ordering it.

Respondent commenced this action in September 1980, and petitioner's motion was filed in September 1981. The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f),[6] which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

In this Court, respondent's brief and oral argument have been devoted as much to the proposition that an adequate showing of exposure to petitioner's asbestos products was made as to the proposition that no such showing should have been required. But the Court of Appeals declined to address either the adequacy of the showing made by respondent in opposition to petitioner's motion for summary judgment, or the question whether such a showing, if reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial. We think the Court of Appeals with its superior knowledge of local law is better suited than we are to make these determinations in the first instance.

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[6] Rule 56(f) provides:

"Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed. Rule Civ. Proc. 1; see Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F. R. D. 465, 467 (1984). Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, concurring.

I agree that the Court of Appeals was wrong in holding that the moving defendant must always support his motion with evidence or affidavits showing the absence of a genuine dispute about a material fact. I also agree that the movant may rely on depositions, answers to interrogatories, and the like, to demonstrate that the plaintiff has no evidence to prove his case and hence that there can be no factual dispute. But the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.

A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery Rules or by court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit.

Petitioner Celotex does not dispute that if respondent has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact. Tr. of Oral Arg. 43, 45. It asserts, however, that respondent has failed on request to produce any basis for her case. Respondent, on the other hand, does not contend that she was not obligated to reveal her witnesses and evidence but insists that she has revealed enough to defeat the motion for summary judgment. Because the Court of Appeals found it unnecessary to address this aspect of the case, I agree that the case should be remanded for further proceedings.

JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and JUSTICE BLACKMUN join, dissenting.

This case requires the Court to determine whether Celotex satisfied its initial burden of production in moving for summary judgment on the ground that the plaintiff lacked evidence to establish an essential element of her case at trial. I do not disagree with the Court's legal analysis. The Court clearly rejects the ruling of the Court of Appeals that the defendant must provide affirmative evidence disproving the plaintiff's case. Beyond this, however, the Court has not clearly explained what is required of a moving party seeking summary judgment on the ground that the nonmoving party cannot prove its case.[1] This lack of clarity is unfortunate: district courts must routinely decide summary judgment motions, and the Court's opinion will very likely create confusion. For this reason, even if I agreed with the Court's result, I would have written separately to explain more clearly the law in this area. However, because I believe that Celotex did not meet its burden of production under Federal Rule of Civil Procedure 56, I respectfully dissent from the Court's judgment.

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[1] It is also unclear what the Court of Appeals is supposed to do in this case on remand. JUSTICE WHITE—who has provided the Court's fifth vote—plainly believes that the Court of Appeals should reevaluate whether the defendant met its initial burden of production. However, the decision to reverse rather than to vacate the judgment below implies that the Court of Appeals should assume that Celotex has met its initial burden of production and ask only whether the plaintiff responded adequately, and, if so, whether the defendant has met its ultimate burden of persuasion that no genuine issue exists for trial. Absent some clearer expression from the Court to the contrary, JUSTICE WHITE's understanding would seem to be controlling. Cf. *Marks* v. *United States*, 430 U. S. 188, 193 (1977).

I

Summary judgment is appropriate where the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. Rule Civ. Proc. 56(c). The burden of establishing the nonexistence of a "genuine issue" is on the party moving for summary judgment. 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727, p. 121 (2d ed. 1983) (hereinafter Wright) (citing cases); 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 56.15[3] (2d ed. 1985) (hereinafter Moore) (citing cases). See also, *ante*, at 323; *ante*, at 328 (WHITE, J., concurring). This burden has two distinct components: an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and an ultimate burden of persuasion, which always remains on the moving party. See 10A Wright § 2727. The court need not decide whether the moving party has satisfied its ultimate burden of persuasion[2] unless and until the court finds that the moving party has discharged its initial burden of production. *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 157–161 (1970); 1963 Advisory Committee's Notes on Fed. Rule Civ. Proc. 56(e), 28 U. S. C. App., p. 626.

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[2] The burden of persuasion imposed on a moving party by Rule 56 is a stringent one. 6 Moore ¶ 56.15[3], p. 56–466; 10A Wright § 2727, p. 124. Summary judgment should not be granted unless it is clear that a trial is unnecessary, *Anderson* v. *Liberty Lobby, Inc.*, *ante*, at 255, and any doubt as to the existence of a genuine issue for trial should be resolved against the moving party, *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 158–159 (1970). In determining whether a moving party has met its burden of persuasion, the court is obliged to take account of the entire setting of the case and must consider all papers of record as well as any materials prepared for the motion. 10A Wright § 2721, p. 44; see, *e. g.*, *Stepanischen* v. *Merchants Despatch Transportation Corp.*, 722 F. 2d 922, 930 (CA1 1983); *Higgenbotham* v. *Ochsner Foundation Hospital*, 607 F. 2d 653, 656 (CA5 1979). As explained by the Court of Appeals for the Third Circuit in *In re Japanese Electronic Products Antitrust Litigation*, 723 F. 2d 238 (1983), rev'd on other grounds *sub nom. Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574 (1986), "[i]f . . . there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment . . . ." 723 F. 2d, at 258.

The burden of production imposed by Rule 56 requires the moving party to make a prima facie showing that it is entitled to summary judgment. 10A Wright § 2727. The manner in which this showing can be made depends upon which party will bear the burden of persuasion on the challenged claim at trial. If the *moving* party will bear the burden of persuasion at trial, that party must support its motion with credible evidence—using any of the materials specified in Rule 56(c)—that would entitle it to a directed verdict if not controverted at trial. *Ibid.* Such an affirmative showing shifts the burden of production to the party opposing the motion and requires that party either to produce evidentiary materials that demonstrate the existence of a "genuine issue" for trial or to submit an affidavit requesting additional time for discovery. *Ibid.*; Fed. Rules Civ. Proc. 56(e), (f).

If the burden of persuasion at trial would be on the *nonmoving* party, the party moving for summary judgment may satisfy Rule 56's burden of production in either of two ways. First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. See 10A Wright § 2727, pp. 130–131; Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L. J. 745, 750 (1974) (hereinafter Louis). If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. *Anderson* v. *Liberty Lobby, Inc.*, *ante*, at 249.

Where the moving party adopts this second option and seeks summary judgment on the ground that the nonmoving party—who will bear the burden of persuasion at trial—has no evidence, the mechanics of discharging Rule 56's burden of production are somewhat trickier. Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. See *ante*, at 328 (WHITE, J., concurring). Such a "burden" of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. See Louis 750–751. Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. *Ante*, at 323. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories, and other exchanges between the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party.

If the moving party has not fully discharged this initial burden of production, its motion for summary judgment must be denied, and the court need not consider whether the moving party has met its ultimate burden of persuasion. Accordingly, the nonmoving party may defeat a motion for summary judgment that asserts that the nonmoving party has no evidence by calling the court's attention to supporting evidence already in the record that was overlooked or ignored by the moving party. In that event, the moving party must respond by making an attempt to demonstrate the inadequacy of this evidence, for it is only by attacking all the record evidence allegedly supporting the nonmoving party that a party seeking summary judgment satisfies Rule 56's burden of production.[3] Thus, if the record disclosed that the moving party had overlooked a witness who would provide relevant testimony for the nonmoving party at trial, the court could not find that the moving party had discharged its initial burden of production unless the moving party sought to demonstrate the inadequacy of this witness' testimony. Absent such a demonstration, summary judgment would have to be denied on the ground that the moving party had failed to meet its burden of production under Rule 56.

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[3] Once the moving party has attacked whatever record evidence—if any—the nonmoving party purports to rely upon, the burden of production shifts to the nonmoving party, who must either (1) rehabilitate the evi-

The result in *Adickes* v. *S. H. Kress & Co., supra,* is fully consistent with these principles. In that case, petitioner was refused service in respondent's lunchroom and then was arrested for vagrancy by a local policeman as she left. Petitioner brought an action under 42 U. S. C. § 1983 claiming that the refusal of service and subsequent arrest were the product of a conspiracy between respondent and the police; as proof of this conspiracy, petitioner's complaint alleged that the arresting officer was in respondent's store at the time service was refused. Respondent subsequently moved for summary judgment on the ground that there was no actual evidence in the record from which a jury could draw an inference of conspiracy. In response, petitioner pointed to a statement from her own deposition and an unsworn statement by a Kress employee, both already in the record and both ignored by respondent, that the policeman who arrested petitioner was in the store at the time she was refused service. We agreed that "[i]f a policeman were present, . . . it would be open to a jury, in light of the sequence that fol-

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dence attacked in the moving party's papers, (2) produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e), or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f). See 10A Wright § 2727, pp. 138–143. Summary judgment should be granted if the nonmoving party fails to respond in one or more of these ways, or if, after the nonmoving party responds, the court determines that the moving party has met its ultimate burden of persuading the court that there is no genuine issue of material fact for trial. See, *e. g., First National Bank of Arizona* v. *Cities Service Co.*, 391 U. S. 253, 289 (1968).

lowed, to infer from the circumstances that the policeman and Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service." 398 U. S., at 158. Consequently, we held that it was error to grant summary judgment "on the basis of this record" because respondent had "failed to fulfill its initial burden" of demonstrating that there was no evidence that there was a policeman in the store. *Id.*, at 157–158.

The opinion in *Adickes* has sometimes been read to hold that summary judgment was inappropriate because the respondent had not submitted affirmative evidence to negate the possibility that there was a policeman in the store. See Brief for Respondent 20, n. 30 (citing cases). The Court of Appeals apparently read *Adickes* this way and therefore required Celotex to submit evidence establishing that plaintiff's decedent had not been exposed to Celotex asbestos. I agree with the Court that this reading of *Adickes* was erroneous and that Celotex could seek summary judgment on the ground that plaintiff could not prove exposure to Celotex asbestos at trial. However, Celotex was still required to satisfy its initial burden of production.

II

I do not read the Court's opinion to say anything inconsistent with or different than the preceding discussion. My disagreement with the Court concerns the application of these principles to the facts of this case.

Defendant Celotex sought summary judgment on the ground that plaintiff had "failed to produce" any evidence that her decedent had ever been exposed to Celotex asbestos.[4] App. 170. Celotex supported this motion with a two-page "Statement of Material Facts as to Which There is No Genuine Issue" and a three-page "Memorandum of Points and Authorities" which asserted that the plaintiff had failed to identify any evidence in responding to two sets of interrogatories propounded by Celotex and that therefore the record was "totally devoid" of evidence to support plaintiff's claim. See *id.*, at 171–176.

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[4] JUSTICE STEVENS asserts that the District Court granted summary judgment on the ground that the plaintiff had failed to show exposure in the District of Columbia. He contends that the judgment of the Court of Appeals reversing the District Court's judgment should be affirmed on the "narrow ground" that it was "palpably erroneous" to grant summary judgment on this basis. *Post*, at 339 (dissenting). The Court replies that

Approximately three months earlier, Celotex had filed an essentially identical motion. Plaintiff responded to this earlier motion by producing three pieces of evidence which she claimed "[a]t the very least . . . demonstrate that there is a genuine factual dispute for trial," *id.*, at 143: (1) a letter from an insurance representative of another defendant describing asbestos products to which plaintiff's decedent had been exposed, *id.*, at 160; (2) a letter from T. R. Hoff, a former supervisor of decedent, describing asbestos products to which decedent had been exposed, *id.*, at 162; and (3) a copy of decedent's deposition from earlier workmen's compensation proceedings, *id.*, at 164. Plaintiff also apparently in-

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what the District Court said was that plaintiff had failed to show exposure in the District of Columbia "or elsewhere." *Ante*, at 320, n. 2. In my view, it does not really matter which reading is correct in this case. For, contrary to JUSTICE STEVENS' claim, deciding this case on the ground that Celotex failed to meet its burden of production under Rule 56 does not involve an "abstract exercise in Rule construction." *Post*, at 339 (STEVENS, J., dissenting). To the contrary, the principles governing a movant's burden of proof are straightforward and well established, and deciding the case on this basis does not require a new construction of Rule 56 at all; it simply entails applying established law to the particular facts of this case. The choice to reverse because of "palpable erro[r]" with respect to the burden of a moving party under Rule 56 is thus no more "abstract" than the choice to reverse because of such error with respect to the elements of a tort claim. Indeed, given that the issue of the moving party's burden under Rule 56 was the basis of the Court of Appeals' decision, the question upon which certiorari was granted, and the issue briefed by the parties and argued to the Court, it would seem to be the preferable ground for deciding the case.

dicated at that time that she intended to call Mr. Hoff as a witness at trial. Tr. of Oral Arg. 6–7, 27–29.

Celotex subsequently withdrew its first motion for summary judgment. See App. 167.[5] However, as a result of this motion, when Celotex filed its second summary judgment motion, the record *did* contain evidence—including at least one witness—supporting plaintiff's claim. Indeed, counsel for Celotex admitted to this Court at oral argument that Celotex was aware of this evidence and of plaintiff's intention to call Mr. Hoff as a witness at trial when the second summary judgment motion was filed. Tr. of Oral Arg. 5–7. Moreover, plaintiff's response to Celotex' second motion pointed to this evidence—noting that it had already been provided to counsel for Celotex in connection with the first motion—and argued that Celotex had failed to "meet its burden of proving that there is no genuine factual dispute for trial." App. 188.

On these facts, there is simply no question that Celotex failed to discharge its initial burden of production. Having chosen to base its motion on the argument that there was no evidence in the record to support plaintiff's claim, Celotex was not free to ignore supporting evidence that the record clearly contained. Rather, Celotex was required, as an initial matter, to attack the adequacy of this evidence. Celotex' failure to fulfill this simple requirement constituted a failure to discharge its initial burden of production under Rule 56, and thereby rendered summary judgment improper.[6]

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[5] Celotex apparently withdrew this motion because, contrary to the assertion made in the first summary judgment motion, its second set of interrogatories had not been served on the plaintiff.

[6] If the plaintiff had answered Celotex' second set of interrogatories with the evidence in her response to the first summary judgment motion, and Celotex had ignored those interrogatories and based its second summary judgment motion on the first set of interrogatories only, Celotex obviously could not claim to have discharged its Rule 56 burden of production. This result should not be different simply because the evidence

This case is indistinguishable from *Adickes*. Here, as there, the defendant moved for summary judgment on the ground that the record contained no evidence to support an essential element of the plaintiff's claim. Here, as there, the plaintiff responded by drawing the court's attention to evidence that was already in the record and that had been ignored by the moving party. Consequently, here, as there, summary judgment should be denied on the ground that the moving party failed to satisfy its initial burden of production.[7]

JUSTICE STEVENS, dissenting.

As the Court points out, *ante*, at 319–320, petitioner's motion for summary judgment was based on the proposition that respondent could not prevail unless she proved that her deceased husband had been exposed to petitioner's products "within the jurisdictional limits" of the District of Columbia.[1]

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plaintiff relied upon to support her claim was acquired by Celotex other than in plaintiff's answers to interrogatories.

[7] Although JUSTICE WHITE agrees that "if [plaintiff] has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact," he would remand "[b]ecause the Court of Appeals found it unnecessary to address this aspect of the case." *Ante*, at 328–329 (concurring). However, Celotex has admitted that plaintiff had disclosed her intent to call Mr. Hoff as a witness at trial before Celotex filed its second motion for summary judgment. Tr. of Oral Arg. 6–7. Under the circumstances, then, remanding is a waste of time.

[1] See Motion of Defendant Celotex Corporation for Summary Judgment, App. 170 ("Defendant Celotex Corporation, pursuant to Rule 56 (b) of the Federal Rules of Civil Procedure moves this Court for an Order granting Summary Judgment on the ground that plaintiff has failed to produce evidence that any product designed, manufactured or distributed by Celotex Corporation was the proximate cause of the injuries alleged *within the jurisdictional limits of this Court*") (emphasis added); Memorandum of Points and Authorities in Support of Motion of Defendant Celotex Corporation for Summary Judgment, *id.*, at 175 (Plaintiff "must demonstrate some link between a Celotex Corporation product claimed to be the cause of the decedent's illness and the decedent himself. The record is totally devoid of any such evidence *within the jurisdictional confines of this Court*") (emphasis added); Transcript of Argument in Support of Motion of Defend-

Respondent made an adequate showing—albeit possibly not in admissible form[2]—that her husband had been exposed to petitioner's product in Illinois.[3] Although the basis of the motion and the argument had been the lack of exposure *in the District of Columbia*, the District Court stated at the end of the argument: "The Court will grant the defendant Celotex's motion for summary judgment there being no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia *or elsewhere* within the statutory period." App. 217 (emphasis added). The District Court offered no additional explanation and no written opinion. The Court of Appeals reversed on the basis that Celotex had not met its burden; the court noted the incongruity of the District Court's opinion in the context of the motion and argument, but did not rest on that basis because of the "or elsewhere" language.[4]

Taken in the context of the motion for summary judgment on the basis of no exposure in the District of Columbia, the

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ant Celotex Corporation for Summary Judgment, *id.*, at 211 ("Our position is . . . there has been no product identification of any Celotex products . . . that have been used *in the District of Columbia* to which the decedent was exposed") (emphasis added).

[2] But cf. *ante*, at 324 ("We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment").

[3] See App. 160 (letter from Aetna Life Insurance Co.) (referring to the "asbestos that Mr. Catrett came into contact with while working for Anning-Johnson Company" and noting that the "manufacturer of this product" was purchased by Celotex); *id.*, at 162 (letter from Anning-Johnson Co.) (confirming that Catrett worked for the company and supervised the installation of asbestos produced by the company that Celotex ultimately purchased); *id.*, at 164, 164c (deposition of Catrett) (description of his work with asbestos "in Chicago").

[4] See *Catrett* v. *Johns-Manville Sales Corp.*, 756 F. 2d 181, 185, n. 14 (1985) ("[T]he discussion at the time the motion was granted actually spoke to venue. It was only the phrase 'or elsewhere,' appearing with no prior discussion, in the judge's oral ruling at the close of argument that made the grant of summary judgment even conceivably proper").

District Court's decision to grant summary judgment was palpably erroneous. The court's bench reference to "or elsewhere" neither validated that decision nor raised the complex question addressed by this Court today. In light of the District Court's plain error, therefore, it is perfectly clear that, even after this Court's abstract exercise in Rule construction, we should nonetheless affirm the reversal of summary judgment on that narrow ground.[5]

I respectfully dissent.

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[5] Cf. n. 2, *supra*. The Court's statement that the case should be remanded because the Court of Appeals has a "superior knowledge of local law," *ante*, at 327, is bewildering because there is no question of local law to be decided. Cf. *Bishop* v. *Wood*, 426 U. S. 341, 345–347 (1976).

The Court's decision to remand when a sufficient ground for affirmance is available does reveal, however, the Court's increasing tendency to adopt a presumption of reversal. See, *e. g.*, *New York* v. *P. J. Video, Inc.*, 475 U. S. 868, 884 (1986) (MARSHALL, J., dissenting); *Icicle Seafoods, Inc.* v. *Worthington*, 475 U. S. 709, 715 (1986) (STEVENS, J., dissenting); *City of Los Angeles* v. *Heller*, 475 U. S. 796, 800 (1986) (STEVENS, J., dissenting); *Pennsylvania* v. *Goldhammer*, 474 U. S. 28, 31 (1985) (STEVENS, J., dissenting). As a matter of efficient judicial administration and of respect for the state and federal courts, I believe the presumption should be precisely the opposite.

MacDONALD, SOMMER & FRATES *v.* COUNTY OF YOLO ET AL.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

No. 84–2015. Argued March 26, 1986—Decided June 25, 1986

Appellant submitted a proposal to the Yolo County Planning Commission to subdivide certain property into 159 single-family and multifamily residential lots. The Commission rejected the proposal, and the County Board of Supervisors affirmed on the grounds that the proposal failed to provide adequate public street access, sewer services, water supplies, and police protection. Appellant then filed an action in California Superior Court, alleging that appellee county and city restricted the property in question to agricultural use by denying all subdivision applications and thereby appropriated the "entire economic use" of the property for the sole purpose of providing a public, open-space buffer. Appellant sought declaratory and monetary relief. The court sustained a demurrer to the complaint, holding that appellant's factual allegations were insufficient and that monetary damages for inverse condemnation were foreclosed by *Agins* v. *City of Tiburon*, 24 Cal. 3d 266, 598 P. 2d 25, aff'd, 447 U. S. 255. The California Court of Appeal affirmed, and the California Supreme Court denied appellant's petition for hearing.

Held: Absent a final and authoritative determination by the County Planning Commission as to how it will apply the regulations at issue to the property in question, this Court cannot determine whether a "taking" has occurred or whether the county failed to provide "just compensation." Without knowing the nature and extent of permitted development, this Court cannot adjudicate the constitutionality of the regulations that purport to limit it. Pp. 348–353.

Affirmed.

Stevens, J., delivered the opinion of the Court, in which Brennan, Marshall, Blackmun, and O'Connor, JJ., joined. White, J., filed a dissenting opinion, in which Burger, C. J., joined and in Parts I, II, and III of which Powell and Rehnquist, JJ., joined, *post*, p. 353. Rehnquist, J., filed a dissenting opinion in which Powell, J., joined, *post*, p. 364.

Howard N. Ellman argued the cause for appellant. With him on the briefs were *Gus Bauman*, *Kenneth N. Burns*, *Scott C. Verges*, and *Edward R. MacDonald*.

William L. Owen argued the cause for appellees. With him on the brief were *Richard W. Sherwood, Charles R. Mack*, and *P. Lawrence Klose.**

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*Briefs of *amici curiae* urging reversal were filed for Adirondack Park Local Government Review Board et al. by *Ronald A. Zumbrun, Robert K. Best*, and *Thomas W. Birmingham;* for the American College of Real Estate Lawyers by *Robert O. Hetlage, Eugene J. Morris, John P. Trevaskis, Jr.*, and *Edward I. Cutler;* for the California Building Industry Association by *Rex E. Lee, Benjamin W. Heineman, Jr.*, and *Carter G. Phillips;* for the First English Evangelical Lutheran Church of Glendale, Cal., et al. by *Jerrold A. Fadem* and *Michael M. Berger;* for Lodestar Co. by *Gideon Kanner;* and for the Mid-America Legal Foundation by *John M. Cannon, Susan W. Wanat*, and *Ann Plunkett Sheldon.*

Briefs of *amici curiae* urging affirmance were filed for the city of Mountain View, Cal., et al. by *Peter D. Bulens, Robert J. Logan, Carter J. Stroud, Albert E. Polonsky, R. R. Campagna, Robert J. Lanzone, Mary Jo Levinger, Steven F. Nord, K. Duane Lyders, John W. Witt, Hadden Roth*, and *Robert Rogers;* for the American Farmland Trust et al. by *Fred P. Bosselman* and *Clifford L. Weaver;* for the County Supervisors Association of California by *Mark A. Wasser;* and for the National Association of Counties et al. by *Benna Ruth Solomon* and *Joyce Holmes Benjamin.*

Briefs of *amici curiae* were filed for the United States by *Solicitor General Fried, Assistant Attorney General Habicht, Deputy Solicitor General Kuhl, Deputy Assistant Attorney General Marzulla*, and *Peter R. Steenland;* for the State of California *ex rel.* John K. Van de Kamp, Attorney General, et al. by *Mr. Van de Kamp, Richard C. Jacobs, N. Gregory Taylor*, and *Theodora Berger*, Assistant Attorneys General, and *Craig C. Thompson* and *Richard M. Frank*, Deputy Attorneys General, joined by the Attorneys General of their respective jurisdictions as follows: *Harold M. Brown* of Alaska, *Francis X. Bellotti* of Massachusetts, *LeRoy S. Zimmerman* of Pennsylvania, *Charles M. Oberly III* of Delaware, *Jim Smith* of Florida, *L. Su' esu' Lutu* of American Samoa, *Leroy Mercer* of the Virgin Islands, *Richard Opper* of Guam, *Corinne K. A. Watanabe* of Hawaii, *James T. Jones* of Idaho, *Neil F. Hartigan* of Illinois, *Linley E. Pearson* of Indiana, *Thomas J. Miller* of Iowa, *William J. Guste, Jr.*, of Louisiana, *James E. Tierney* of Maine, *Stephen H. Sachs* of Maryland, *Frank J. Kelley* of Michigan, *William L. Webster* of Missouri, *Jeffrey L. Amestoy* of Vermont, *Hubert H. Humphrey III* of Minnesota, *Robert Abrams* of New York, *T. Travis Medlock* of South Carolina, *Jim Maddox* of Texas, *David L. Wilkenson* of Utah, *Kenneth O. Eikenberry* of Washington, *Bronson C. La Follette* of Wisconsin, and *Archie G. McClintock* of Wyoming; for the National Institute of Municipal Law Officers et al. by *Roy D. Bates, Wil-*

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether rejection of a subdivision proposal deprived appellant of its property without just compensation contrary to the Fifth and Fourteenth Amendments to the United States Constitution.[1]

I

This appeal is taken from a judgment sustaining a demurrer to a property owner's complaint for money damages for an alleged "taking" of its property. In 1975, appellant submitted a tentative subdivision map to the Yolo County Planning Commission. Under appellant's proposal, the subject property, at least part of which was planted with corn, would be subdivided into 159 single-family and multifamily residential lots.

The Yolo County Planning Commission rejected the subdivision plan, however, and the Board of Supervisors of the county affirmed that determination. The Board found numerous reasons why appellant's tentative subdivision map was neither "consistent with the General Plan of the County of Yolo, nor with the specific plan of the County of Yolo embodied in the Zoning Regulations for the County." App. 73. Appellant focuses our attention on four of those reasons. See *id.*, at 45–46 (fourth amended complaint). First, the

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liam I. Thornton, Jr., John W. Witt, Roger F. Cutler, George Agnost, J. Lamar Shelley, Robert J. Alfton, James K. Baker, Frank B. Gummey III, James D. Montgomery, Clifford D. Pierce, Jr., William H. Taube, and *Charles S. Rhyne;* and for the Conservation Foundation et al. by *Charles L. Siemon, Wendy U. Larsen,* and *Christopher J. Duerksen.*

[1] The Fifth Amendment provides "nor shall private property be taken for public use, without just compensation." The Fifth Amendment prohibition applies against the States through the Fourteenth Amendment. See *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 236, 239, 241 (1897). See also *Williamson Planning Comm'n* v. *Hamilton Bank,* 473 U. S. 172, 175, n. 1 (1985); *San Diego Gas & Electric Co.* v. *San Diego,* 450 U. S. 621, 623, n. 1 (1981).

Board criticized the plan because it failed to provide for access to the proposed subdivision by a public street: the city of Davis, to which the subdivision would adjoin, refused to permit the extension of Cowell Boulevard into the development. See *id.*, at 74. Even ignoring this obstacle, "[t]he map presented ma[de] no provision for any other means of access to the subdivision," and the Board calculated that relying on an extension of Cowell Boulevard alone would "constitut[e] a real and substantial danger to the public health in the event of fire, earthquake, flood, or other natural disaster." *Id.*, at 77.

Second, the Board found that appellant's "Tentative Map as presented [did] not provide for sewer service by any governmental entity":

> "The only means for provision of sewer services by the El Macero interceptor sewer require that the proposed subdivision anne[x] to the existing Community Services Area. Said annexation is subject to Local Agency Formation Commission jurisdiction. The Board finds that no proceedings currently are pending before LAFCO for the annexation of the proposed subdivision." *Id.*, at 75.

Third, the Board rejected the development plan because "[t]he level of [police] protection capable of being afforded to the proposed site by the [Yolo County] Sheriff's Department is not intense enough to meet the needs of the proposed subdivision." *Id.*, at 76. Fourth, the Board found inadequate the provision for water service for the reason that there was "no provision made in the proposed subdivision for the provision of water or maintenance of a water system for the subdivision by any governmental entity." *Ibid.*

After this rebuff, appellant filed the present action and, on the same day, a petition for a writ of mandate. The mandate action, which is still pending, seeks to set aside the Board's decision and to direct the Board to reconsider appellant's subdivision proposal. See *id.*, at 32–33 (amended petition for writ of mandate). This action, in contrast, seeks declaratory and monetary relief. In it, appellant accuses appellees County of Yolo and city of Davis of "restricting the Property to an open-space agricultural use by denying all permit applications, subdivision maps, and other requests to implement any other use," *id.*, at 46, and thereby of appropriating the "entire economic use" of appellant's property "for the sole purpose of [providing] . . . a public, open-space buffer," *id.*, at 51. In particular, the fourth amended complaint challenges the Board's decision with respect to the adequacy of public access, sanitation services, water supplies, and fire and police protection.[2] Because appellees denied these services, according to the complaint, "none of the beneficial uses" allowed even for agricultural land would be suitable for appellant's property. *Id.*, at 52. The complaint alleged, in capital letters and "WITHOUT LIMITATION BY THE FOREGOING ENUMERATION," that "ANY APPLICATION FOR A ZONE CHANGE, VARIANCE OR OTHER RELIEF WOULD BE FUTILE." *Id.*, at 58. The complaint also alleged that appellant had "exhausted all of its administrative remedies" and that its seven causes of action were "ripe" for adjudication. *Id.*, at 58, 59.

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[2] "25. In determining that Plaintiff's land could only be used for agricultural purposes, notwithstanding its general planning and zoning designation for residential use and its suitability therefor, County determined that (i) the Property lacked access by means of suitable public streets, a condition resulting from City's deliberate refusal to permit or approve available access; (ii) the [P]roperty lacked sanitary sewer service, a condition resulting directly from the wrongful acts of City, County and District above alleged[;] (iii) the Property lacked adequate water supply, a finding directly contrary to the fact (in evidence before County) that there are proven sources of supply on the Property and in the vicinity thereof which serve the immediately adjacent residential areas[;] and (iv) that the Property lacked adequate fire and police services, conditions attributable in part to refusal on part of County and City to provide such services." App. 51–52.

In response to these charges appellees demurred.[3] Pointing to "its earlier Order Sustaining Demurrers and Granting Leave to Amend," the California Superior Court contended that "the property had obvious other uses than agriculture under the Yolo County Code," *id.*, at 115, and referenced sections permitting such uses, among others, as ranch and farm dwellings and agricultural storage facilities, see Yolo County Code §§ 8–2.502, 8–2.503. The court rejected appellant's "attemp[t] to overcome that defect by alleging as conclusionary fact that each and every principal use and each and every multiple accessory use is no longer possible so that the property does have no value as zoned." App. 115. It concluded that, irrespective of the insufficiency of appellant's factual allegations, monetary damages for inverse condemnation are foreclosed by the California Supreme Court's decision in

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[3] In California, "those factual allegations of the complaint which are properly pleaded are deemed admitted by defendant's demurrer." *Thompson* v. *County of Alameda*, 27 Cal. 3d 741, 746, 614 P. 2d 728, 730 (1980). "However," a demurrer "does not admit contentions, deductions or conclusions of fact or law alleged therein." *Daar* v. *Yellow Cab Co.*, 67 Cal. 2d 695, 713, 433 P. 2d 732, 745 (1967) (citations omitted). See, *e. g.*, *Serrano* v. *Priest*, 5 Cal. 3d 584, 591, 487 P. 2d 1241, 1245 (1971); *Chicago Title Ins. Co.* v. *Great Western Financial Corp.*, 69 Cal. 2d 305, 327, 444 P. 2d 481, 495 (1968); *Sych* v. *Insurance Co. of North America*, 173 Cal. App. 3d 321, 326, 220 Cal. Rptr. 692, 695 (1985); *Read* v. *City of Lynwood*, 173 Cal. App. 3d 437, 442, 219 Cal. Rptr. 26, 28 (1985). Thus, one intermediate California appellate court has sustained a demurrer to a complaint alleging a regulatory taking on jurisdictional grounds, notwithstanding an "allegation in [appellants'] complaint that they 'have exhausted their administrative remedies'"; for "while a demurrer admits all material facts which are properly pleaded, it does not admit conclusions of fact or law alleged therein. Appellants' conclusionary statement that they exhausted their administrative remedies therefore cannot avail them." *Pan Pacific Properties, Inc.* v. *County of Santa Cruz*, 81 Cal. App. 3d 244, 251, 146 Cal. Rptr. 428, 432 (1978) (citation omitted). Cf. *Hecton* v. *People ex rel. Dept. of Transportation*, 58 Cal. App. 3d 653, 657, 130 Cal. Rptr. 230, 232 (1976) (same; allegations of taking and damage).

Agins v. *City of Tiburon*, 24 Cal. 3d 266, 274–277, 598 P. 2d 25, 29–31 (1979), aff'd, 447 U. S. 255 (1980). App. 116, 118.[4]

The California Court of Appeal affirmed. It "accept[ed] as true all the properly pled factual allegations of the complaint," *id.*, at 126, and did "not consider whether the complaint was barred by the failure to exhaust administrative remedies or by res judicata," *id.*, at 125–126. But it "f[ou]nd the decision in *Agins* to be controlling herein," *id.*, at 130:

> "In that case the [California] Supreme Court specifically and clearly established, for policy reasons, a rule of law which precludes a landowner from recovering in inverse condemnation based upon land use regulation. We emphasize that the Court did not hold that regulation cannot amount to a taking without compensation, it simply held that in such event the remedy is not inverse condemnation. The remedy instead is an action to have the regulation set aside as unconstitutional. Plaintiff has filed a mandate action in the trial court which is currently pending. That is its proper remedy. The claim for inverse condemnation cannot be maintained." *Id.*, at 130–131 (citation and footnote omitted).

In the alternative, the California Court of Appeal determined that appellant would not be entitled to monetary relief even if California law provided for this remedy:

> "In any event, even if an inverse condemnation action were available in a land use regulation situation, we would be constrained to hold that plaintiff has failed to

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[4] We understand the Superior Court to have sustained the demurrer both because the complaint failed properly to plead facts amounting to a taking and because California law does not provide a monetary remedy for a regulatory taking. The Superior Court, after explaining these two reasons, concluded simply that "[t]he complaint fails to state a proper cause of action for inverse condemnation." App. 116. Although JUSTICE WHITE's dissent treats the first reason as dicta and the second as the actual basis of decision, see *post*, at 355–356, since the Superior Court did not rest its holding on only one of its two stated reasons, it is appropriate to treat them as alternative bases of decision.

state a cause of action. Pared to their essence, the allegations are that plaintiff purchased property for residential development, the property is zoned for residential development, plaintiff submitted an application for approval of development of the property into 159 residential units, and, in part at the urging of the City, the County denied approval of the application. In these allegations plaintiff is not unlike the plaintiffs in *Agins* . . . [a case in which] both the California Supreme Court and the United States Supreme Court held that the plaintiffs had failed to allege facts which would establish an unconstitutional taking of private property.

"The plaintiff's claim here must fail for the same reasons the claims in *Agins* failed. Here plaintiff applied for approval of a particular and relatively intensive residential development and the application was denied. The denial of that particular plan cannot be equated with a refusal to permit any development, and plaintiff concedes that the property is zoned for residential purposes in the County general plan and zoning ordinance. Land use planning is not an all-or-nothing proposition. A governmental entity is not required to permit a landowner to develop property to [the] full extent he might desire or be charged with an unconstitutional taking of the property. Here, as in *Agins*, the refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development. Accordingly, the complaint fails to state a cause of action." *Id.*, at 132–133 (citation omitted).[5]

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[5] In answer to appellant's 42 U. S. C. § 1983 claim, the California Court of Appeal similarly held that a monetary judgment was foreclosed by *Agins*, and that "[e]ven if a cause of action for monetary damages could be stated under the Civil Rights Act based upon the regulation of the use of property, the allegations would be insufficient in this case:

"Plaintiff seeks compensation because the County refused approval of the intensive development it desires, but that refusal does not mean that other, less intensive uses would also be denied. Accordingly plaintiff has

The California Supreme Court denied appellant's petition for hearing, and appellant perfected an appeal to this Court. Because of the importance of the question whether a monetary remedy in inverse condemnation is constitutionally required in appropriate cases involving regulatory takings, we noted probable jurisdiction. 474 U. S. 917 (1985). On further consideration of our jurisdiction to hear this appeal, aided by briefing and oral argument, we find ourselves unable to address the merits of this question.

II

The regulatory takings claim advanced by appellant has two components. First, appellant must establish that the regulation has in substance "taken" his property[6]—that is, that the regulation "goes too far." *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922). See *Kaiser Aetna* v. *United States*, 444 U. S. 164, 178 (1979). Second, appellant must demonstrate that any proffered compensation is not "just."

It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes. As Justice Holmes emphasized throughout his opinion for the Court in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S., at 416, "this is a question of degree—and therefore cannot be disposed of by general propositions." Accord, *id.*, at 413. To this day we have no "set formula to determine where regulation ends and taking begins." *Goldblatt* v. *Hempstead*, 369 U. S. 590, 594

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not alleged facts sufficient to establish an uncompensated taking of its property." App. 135.

[6] We accept for the purposes of deciding this case that any taking was for a public purpose, as alleged in the complaint. See *id.*, at 50. See also *id.*, at 51, 60.

(1962). Instead, we rely "as much [on] the exercise of judgment as [on] the application of logic." *Andrus* v. *Allard*, 444 U. S. 51, 65 (1979). Our cases have accordingly "examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action—that have particular significance." *Kaiser Aetna* v. *United States*, 444 U. S., at 175. See *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 124 (1978) ("ad hoc, factual inquiries"); *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958) ("question properly turning upon the particular circumstances of each case"). Until a property owner has "obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property," "it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests ha[ve] been destroyed." *Williamson Planning Comm'n* v. *Hamilton Bank*, 473 U. S. 172, 186, 190, n. 11 (1985). As we explained last Term:

> "[T]he difficult problem [is] how to define "too far," that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. . . . [R]esolution of that question depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectation. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property." *Id.*, at 199–200 (footnote omitted).

Accord, *id.*, at 191.

For similar reasons, a court cannot determine whether a municipality has failed to provide "just compensation" until it knows what, if any, compensation the responsible administrative body intends to provide. See *id.*, at 195 ("[T]he State's action here is not 'complete' until the State fails to provide adequate compensation for the taking" (footnote omitted)). The local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other. In *Penn Central Transportation Co.* v. *New York City*, for example, we recognized that the Landmarks Preservation Commission, the administrative body primarily responsible for administering New York City's Landmarks Preservation Law, had authority in appropriate circumstances to authorize alterations, remit taxes, and transfer development rights to ensure the landmark owner a reasonable return on its property. See 438 U. S., at 112–115, and n. 13. Because the railroad had "not sought approval for the construction of a smaller structure" than its proposed 50-plus story office building, *id.*, at 137; see *id.*, at 137, n. 34, and because its development rights in the airspace above its Grand Central Station Terminal were transferable "to at least eight parcels in the vicinity of the Terminal, one or two of which ha[d] been found suitable for the construction of a new office building," *id.*, at 137, we concluded that "the application of New York City's Landmarks Law ha[d] not effected a 'taking' of [the railroad's] property," *id.*, at 138. Whether the inquiry asks if a regulation has "gone too far," or whether it seeks to determine if proffered compensation is "just," no answer is possible until a court knows what use, if any, may be made of the affected property.[7]

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[7] A property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this determination. See *Williamson Planning Comm'n* v. *Hamilton Bank*, 473 U. S., at 205–206 (STEVENS, J., concurring in judgment); *United States* v. *Dickinson*, 331 U. S. 745, 749 (1947).

Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it. Thus, in *Agins* v. *Tiburon*, 447 U. S. 255 (1980), we held that zoning ordinances which authorized the development of between one and five single-family residences on appellants' 5-acre tract did not effect a taking of their property on their face, and, because appellants had not made application for any improvements to their property, the constitutionality of any particular application of the ordinances was not properly before us. See *id.*, at 260. Similarly, in *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621 (1981), we dismissed the appeal because it did not appear that the city's rezoning and adoption of an open space plan had deprived the utility of all beneficial use of its property. See *id.*, at 631–632, and n. 12. Because the California Court of Appeal had "not decided whether any taking in fact ha[d] occurred, . . . further proceedings [were] necessary to resolve the federal question whether there has been a taking at all." *Id.*, at 633. As a consequence, the judgment was not final for purposes of our jurisdiction under 28 U. S. C. § 1257. *Ibid.* Most recently, in *Williamson Planning Comm'n* v. *Hamilton Bank*, we held that the developer's failure either to seek variances that would have allowed it to develop the property in accordance with its proposed plat, or to avail itself of an available and facially adequate state procedure by which it might obtain "just compensation," meant that its regulatory taking claim was premature.

Here, in comparison to the situations of the property owners in the three preceding cases, appellant has submitted one subdivision proposal and has received the Board's response thereto. Nevertheless, appellant still has yet to receive the Board's "final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson Planning Comm'n* v. *Hamilton Bank*, 473 U. S., at 191. In *Agins, San Diego Gas & Electric*, and *William-*

son Planning Comm'n, we declined to reach the question whether the Constitution requires a monetary remedy to redress some regulatory takings because the records in those cases left us uncertain whether the property at issue had in fact been taken. Likewise, in this case, the holdings of both courts below leave open the possibility that some development will be permitted,[8] and thus again leave us in doubt re-

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[8] Appellant's current complaint—as authoritatively construed by the California Court of Appeal—alleged the denial of only one intense type of residential development. Appellant does not contend that only improvements along the lines of its 159-home subdivision plan would avert a regulatory taking. Rather, the complaint alleged that appellant was deprived of all beneficial use of its property. See App. 51, 60, 65. The California Court of Appeal, whose opinion on matters of local law and local pleading we must respect, cf. *Agins* v. *Tiburon*, 447 U. S. 255, 259–260, n. 5 (1980), apparently rejected what the Superior Court labeled a "conclusionary" allegation of futility, and explained that appellant could seek an administrative application of the Yolo County General Plan and Zoning Ordinances to its property which, for aught that appears, would allow development to proceed.

JUSTICE WHITE's dissent reluctantly concludes that our understanding of the Court of Appeal's decision is "plausible" and "sensible," but insists that the Court of Appeal's decision is "most properly read as taking as true all of the allegations in the complaint, including the allegations of futility, and as rejecting those allegations as insufficient as a matter of substantive takings law." *Post*, at 363. We disagree. Both state courts upheld appellees' demurrer on the ground that not all development had been foreclosed. Thus, the Superior Court apparently accepted appellant's submission that its property was restricted to agricultural use but held that, even so, valuable use might still be made of the land. The Court of Appeal was unwilling to concede even this much: it noted that appellant's property was zoned residential and held that valuable residential development was open to it. These holdings that there is no total prohibition against the productive use of appellant's land cannot possibly be reconciled with the allegations in the complaint that "any beneficial use" is precluded, App. 46, and that future applications would be futile, *id.*, at 58. In view of the fact that these allegations were necessarily rejected by the state courts, and that the parties' briefs disclose a permissible basis for this disposition in settled California demurrer law, see n. 3, *supra;* see also Brief for Respondents in 3 Civil 22306 (Cal. Ct. App., Third App. Dist., July 10, 1984), pp. 25, 27; Memorandum of Points and Authorities in Support of Demurrer to Fourth Amended Complaint in No. 36655 (Cal. Super. Ct., Yolo County, Dec. 18, garding the antecedent question whether appellant's property has been taken.[9] The judgment is therefore

Affirmed.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins and with whom JUSTICE POWELL and JUSTICE REHNQUIST join as to Parts I, II, and III, dissenting.

The Court acknowledges that we noted probable jurisdiction in this case "[b]ecause of the importance of the ques-

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1981), 4 Clerk's Tr., pp. 888–889, 912, n. 2, 914, it does not matter that the state courts neglected to "expressly disapprove" the deficient allegations or to detail the particular reasons why, see *post*, at 357.

Remarkably, the dissent implies that the Court of Appeal *accepted* the complaint's allegations that local regulations denied appellant all beneficial use of its property and that further regulatory proceedings would be fruitless, but nonetheless required it to file further "useless" applications to state a taking claim. *Ibid.* Whatever purpose such a requirement might serve, futile reapplications are not contemplated by the Court of Appeal. To begin with, this requirement is not, as the dissent maintains, suggested by the Court of Appeal's reliance on the decisions of the California Supreme Court and of this Court in *Agins*. See App. 132. To the contrary, the Court of Appeal relied on the decisions in *Agins* to illustrate that the property owners there—as here—had not "attempt[ed] to obtain approval to . . . develop the land" in accordance with applicable zoning regulations and for this reason had "failed to allege facts which would establish an unconstitutional taking of private property." *Id.*, at 132–133. See 447 U. S., at 259–263; 24 Cal. 3d 266, 277, 598 P. 2d 25, 31 (1979). The implication is not that future applications would be futile, but that a meaningful application has not yet been made. The dissent's supposition that the Court of Appeal accepted the allegations of taking and futility is further contradicted by the court's express denial that submission of a less intensive application would be futile: "the refusal of the [appellees] to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development." App. 133.

[9] Appellant is thus in the same position Mr. and Mrs. Agins would have occupied if they had requested and been denied the opportunity to build five Victorian mansions for their single-family residences, or if San Diego Gas & Electric Co. had asked and been denied the option of building a nuclear powerplant. Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews. In this case, of course, we have statements from both courts below dispelling any doubt on this point.

tion whether a monetary remedy in inverse condemnation is constitutionally required in appropriate cases involving regulatory takings," *ante*, at 348, but avoids this issue by holding that the antecedent question—whether appellant adequately stated a takings claim—should be answered in the negative. I disagree. The factual allegations that we must consider, when the opinion below is correctly read, do state a takings claim and therefore present the remedial question that we have thrice before sought to resolve. See *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U. S. 172 (1985); *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621 (1981); *Agins* v. *Tiburon*, 447 U. S. 255 (1980).

I

The Court recognizes that "the complaint alleged that appellant was deprived of all beneficial use of its property," *ante*, at 352, n. 8, but concludes:

> "The California Court of Appeal, whose opinion on matters of local law and local pleading we must respect, cf. *Agins* v. *Tiburon*, 447 U. S. 255, 259–260, n. 5 (1980), apparently rejected what the Superior Court labeled a 'conclusionary' allegation of futility, and explained that appellant could seek an administrative application of the Yolo County General Plan and Zoning Ordinances to its property which, for aught that appears, would allow development to proceed." *Ibid.*

The Court thus ignores the allegations in the complaint that the effect of the county's denial of appellant's subdivision application in conjunction with the reasons behind that denial and other actions taken by the appellees has been to deprive the appellant of any use of its property "which is not (a) economically infeasible, (b) prohibited by law, or (c) prevented by actions taken by [the appellees]." Fourth Amended Complaint, App. 46. The Court also disregards appellant's allegation that the actions of the appellees demonstrate "THAT ANY APPLICATION FOR A ZONE CHANGE, VARIANCE OR OTHER

RELIEF WOULD BE FUTILE." *Id.*, at 58. Instead, the Court focuses on the denial of the particular subdivision application alone.

In my view, the Court does not fairly read the record and the opinion below. Appellant's initial complaint filed in Superior Court alleged that although the property was zoned for residential use by the county it was designated an "Agricultural Preserve or Reserve" by the city. The complaint further alleged that even though the property lay in the county outside of the city's boundaries, the county implemented city policy relegating the land to agricultural uses. See Complaint of Oct. 13, 1977, pp. 9–12. Finally, the complaint asserted that the property was agriculturally impaired and could not economically be used for agricultural purposes. See *id.*, at 5, 16.

In sustaining the appellees' demurrer to this complaint, the Superior Court accepted as true the allegation that the property had effectively been rezoned agricultural but noted that there was no allegation that the property could not be used for a variety of nonagricultural purposes explicitly allowed in agricultural zones under the county and city codes. See Order of Mar. 30, 1978, in No. 36655 (Cal. Super. Ct., Yolo County), pp. 6–8. The conclusion was that "[t]he failure to allege the property in question useless for other permitted purposes in an agricultural zone over and above an agricultural use renders the [inverse condemnation cause of action] demurrable." *Id.*, at 8.

In the Fourth Amended Complaint, the complaint that formed the basis for the judgment below, appellant responded to this earlier ruling by specifically alleging that the property was not suitable for the other uses permitted in an agricultural zone and by asserting facts in support of this allegation. See App. 52–58. The Superior Court, however, indicated that it found these allegations "conclusionary," although it did not rely on this determination in sustaining the demurrer to the complaint, relying instead on the California Supreme Court's general ruling in *Agins* v. *City of Tiburon*, 24 Cal. 3d 266, 272–277, 598 P. 2d 25, 28–31 (1979), aff'd on other grounds, 447 U. S. 255 (1980), that no inverse condemnation action may be brought as a result of a land use regulation.[1] The crucial fact here is that the Superior Court denominated "conclusionary" only those allegations in the complaint that rejected the possibility of feasible nonagricultural uses of the property that would be consistent with agricultural zoning. It did not categorize as "conclusionary" appellant's allegations that all economically beneficial residential uses were foreclosed by the appellees' actions.

In reviewing the Superior Court's ruling on the demurrer to the Fourth Amended Complaint, the California Court of Appeal first noted that it would not consider whether the complaint was barred by the failure to exhaust administrative remedies or by res judicata. App. 125–126. It then summarized the allegations of the complaint, including the allegations that the property was not suitable for agricultural use or any of the other uses permitted in the county code and that it was suitable for residential use but that the county and city had acted to prevent this use entirely. *Id.*, at 127–129. The Court of Appeal also noted that appellant had alleged that "[a]ny application for a zone change, variance or other relief would be futile." *Id.*, at 129. Nowhere did the court state that as a matter of California demurrer law it was rejecting any of these allegations as not properly pleaded. And nowhere did it refer to the Superior Court's statement that the allegations as to the infeasibility of the nonagricultural uses that would be consistent with agricultural zoning might not be properly pleaded.

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[1] The Superior Court also sustained the demurrer on the ground that appellant had failed to exhaust administrative and judicial remedies; that the county's denial of appellant's subdivision application was res judicata not subject to collateral attack in the Superior Court; and that no taking in the form of actual "invasion or appropriation of a cognizably valuable property right" had been alleged. App. 111, 116.

Having recited all of these allegations without indicating that it was rejecting any of them, the Court of Appeal first held that no cause of action was stated in inverse condemnation. This holding, it noted, was compelled by the California Supreme Court's ruling in *Agins* that there is no such remedy for takings alleged to result from land use regulation. *Id.*, at 130–132. See *Agins*, 24 Cal. 3d, at 272–277, 598 P. 2d, at 28–31.

In the alternative, however, the Court of Appeal found that even if such a cause of action were available, appellant had not stated a takings claim. The court concluded that "[p]ared to their essence, the allegations are that [appellant] purchased property for residential development, the property is zoned for residential development, [appellant] submitted an application for approval of development of the property into 159 residential units, and, in part at the urging of the City, the County denied approval of the application." App. 132. The court then observed that this situation was "not unlike" that in *Agins*, in which a zoning ordinance that restricted a landowner of five acres to building a maximum of five residences on his property was found not to constitute a taking since on its face the ordinance still allowed that level of development, which was a reasonable use of the property. See *Agins*, 447 U. S., at 262–263; *Agins*, 24 Cal. 3d, at 277, 598 P. 2d, at 31. Citing *Agins*, the Court of Appeal than determined that appellant had not stated a takings cause of action because appellees' refusal to allow the intensive development requested by appellant "does not preclude less intensive, but still valuable development." App. 133.

In my view, given the absence of any expression of disapproval by the Court of Appeal of any of the appellant's allegations summarized in its opinion and given the fact that the Superior Court had not labeled appellant's allegations of futility "conclusionary," there is no reason to read into this last statement by the Court of Appeal a state-law ruling that the allegations of futility were not well pleaded. Instead, the

Court of Appeal's focus on what it termed the essence of appellant's complaint together with its conclusion that with respect to these essential allegations this case was analytically the same as *Agins* imply that it believed that *as a matter of federal takings law* certain allegations controlled in terms of determining if a takings claim had been stated. Specifically, in concluding that the allegations of futility were not material and in determining that under *Agins* further application must be made before a takings claim could be stated, the Court of Appeal held that no takings cause of action had been stated because no reapplication had been made, even if further application would be useless.

II

Whether a regulatory taking has occurred is an inquiry that cannot be completed until a final decision is made as to how the allegedly confiscatory regulations apply to the pertinent property. *Williamson County Regional Planning Comm'n*, 473 U. S., at 190–191. Thus, in *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 136–137 (1978), and in *Agins*, *supra*, at 262–263, we considered for takings purposes only the actual regulatory decision that had been made by the governmental decisionmaker; we declined to speculate as to further restrictions that might be imposed. In *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 293–297 (1981), we refused to consider a takings claim based on general regulatory provisions that had not yet been applied to specific properties and that were susceptible of administrative exemption. Most recently, in *Williamson County Regional Planning Comm'n*, the Court determined that the denial of a particular use for a property did not constitute a final decision where variance procedures were available that "[left] open the possibility that [the landowner] may develop the subdivision according to its plat after obtaining the variances." 473 U. S., at 193–194.

These holdings recognize that a regulatory takings determination is closely tied to the facts of a particular case and that there is often an ongoing process by which the relevant regulatory decisions are made. Given these characteristics of a regulatory taking, the final decision requirement is necessary to ensure that "the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Id.*, at 193. Nothing in our cases, however, suggests that the decisionmaker's definitive position may be determined only from explicit denials of property-owner applications for development. Nor do these cases suggest that repeated applications and denials are necessary to pinpoint that position.

Moreover, I see no reason for importing such a requirement into the "final decision" analysis. A decisionmaker's definitive position may sometimes be determined by factors other than its actual decision on the issue in question. For example, if a landowner applies to develop its land in a relatively intensive manner that is consistent with the applicable zoning requirements and if the governmental body denies that application, explaining that all development will be barred under its interpretation of the zoning ordinance, I would find that a final decision barring all development has been made—even though the landowner did not apply for a less intensive development. Although a landowner must pursue reasonably available avenues that might allow relief, it need not, I believe, take patently fruitless measures.

The Court of Appeal's reliance on *Agins* in this case was therefore misplaced. Appellant alleged not simply that its application had been denied but that the overall effect of (1) that denial, (2) the reasons given for the denial, and (3) other actions taken by appellees to prevent appellant from ever being able to meet county development requirements was that appellant's property had been taken. When the Court of Appeal purported to reduce appellant's claim to its essence, it ignored a critical distinction between *Agins*, in which there was no indication that upon application the property owner would not be allowed to develop his property in some economically beneficial manner, and the factual situation here, in which further application would allegedly be futile. In this case, I believe that appellant sufficiently alleged a final decision denying it all reasonable economically beneficial use of its property.[2]

III

Assuming that appellant adequately alleged a final decision, the next question is whether a takings cause of action was stated by the allegations in the complaint. Discerning the answer to this question involves two separate inquiries: Whether a land use regulation restricting the use of property may ever amount to a taking and, if the answer to this first inquiry is affirmative, whether the allegations here are sufficient to state a takings claim.

As to the first question, our cases have long indicated that police-power regulations may rise to the level of a taking if the restrictions they impose are sufficiently severe. See, *e. g.*, *Agins*, 447 U. S., at 260; *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 83 (1980); *Kaiser Aetna* v. *United States*, 444 U. S. 164, 174–175 (1979); *Andrus* v. *Allard*, 444 U. S. 51, 65–66 (1979); *Penn Central*, *supra*, at 130–131, 138, n. 36; *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958); *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415–416 (1922). Nevertheless, the California Supreme Court in *Agins* concluded:

> "[A] landowner alleging that a zoning ordinance has deprived him of substantially all use of his land may attempt through declaratory relief or mandamus to invalidate the ordinance as excessive regulation in violation of the Fifth Amendment to the United States Constitu-

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[2] I emphasize that the futility of further application would have to be proved at trial for appellant to prevail here on the merits. I address only the question whether appellant's allegations of futility are sufficient support for assuming that a final decision has been made.

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> tion. . . . He may not, however, elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." 24 Cal. 3d, at 273, 598 P. 2d, at 28.[3]

In addition to being inconsistent with this Court's statements, this view, as JUSTICE BRENNAN explained in his dissent in *San Diego Gas*, ignores the fact that

> "[p]olice power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property. . . . It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a 'taking,' and therefore a *de facto* exercise of the power of eminent domain, where the effects completely deprive the owner of all or most

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[3] Although the California Supreme Court's ruling in *Agins* rests on the rationale that excessive land use regulation simply cannot constitute a lawful taking, the Court of Appeal in this case seemed to proceed on the assumption that such regulation could constitute a taking but that no inverse condemnation remedy for such a taking would be available. See App. 131. My discussion here follows the reasoning given by the California Supreme Court in *Agins* rather than the somewhat inexact summary of that reasoning given by the Court of Appeal below.

> of his interest in the property." 450 U. S., at 652–653 (citations and footnotes omitted).

I agree that land use restrictions may constitute a taking under the Constitution.

This resolution of the general question brings me to the more specific question whether the allegations in the complaint here were sufficient to state a takings claim. Here, appellant alleged the existence of a final decision denying it all economically beneficial use of its property. It also alleged that it had paid "good and valuable consideration," App. 43, for the property. Factual allegations of interference with reasonable investment-backed expectations and denial of all economically feasible use of the property are certainly sufficient allegations of a regulatory taking to state a cause of action. See, *e. g., Penn Central*, 438 U. S., at 136–138. Consequently, I would hold that appellant adequately alleged a taking.

IV

The final question presented is whether a State can limit to declaratory and injunctive relief the remedies available to a person whose property has been taken by regulation or whether the State must pay compensation for the interim period between the time that the government first "took" the property and the time that the "taking" is rescinded by amendment of the regulation.[4] On this question, I am again in substantial agreement with JUSTICE BRENNAN's discussion in *San Diego Gas*. See 450 U. S., at 653–660. Even where a property owner is deprived of its property only temporarily, if that deprivation amounts to a taking the Constitution requires that just compensation be paid. If the governmental body that has taken the property decides to rescind the taking by amending the regulation, that does not reverse the fact that the property owner has been deprived of its property in the interim. "[I]t is only fair that the public bear the cost of benefits received during the interim period between application of the regulation and the government entity's rescission of it." *Id.*, at 656–657. Thus, just compensation must be available for the period between the time of the final decision taking the property and the time that that decision is rescinded.

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[4] I assume here that the normal action by the governmental entity following a determination that a particular regulation constitutes a taking will be to rescind the regulation. I believe that this is a permissible course of action, limiting liability for the taking to the interim period. See *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621, 658 (1981) (BRENNAN, J., dissenting). Of course, the governmental entity could actually condemn the property and pay permanent compensation for it.

I recognize that such a constitutional rule admits of problems of administration that are by no means insignificant. Aside from the problems that the Court has already addressed in some measure regarding the determination of when a taking shall be deemed to have occurred, there are questions of valuation and of procedure. As to the latter, the Constitution requires no particular procedures, although as the Court today notes, "[a] property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this determination." *Ante*, at 350, n. 7. As to the former, the issue of what constitutes just compensation in this context is a particularly meaty one, which merits substantial reflection and analysis. Nevertheless, these unsettled questions should not deter us from acting to protect constitutional requirements in this type of case. Consequently, I would vacate the judgment below and remand for further proceedings not inconsistent with the views I have expressed.

V

In sum, I believe that the Court of Appeal's decision is most properly read as taking as true all of the allegations in the complaint, including the allegations of futility, and as rejecting those allegations as insufficient as a matter of substantive takings law. At the very least, the Court's reading of the opinion below, however plausible, is not the only sensible reading of that opinion. Given this arguable ambiguity, I would not, as the Court does, withdraw from appellant all chance of relief at this stage. That is, if the Court of Appeal in fact did reach its judgment by the reasoning I have summarized rather than as the Court hypothesizes, appellant should not be precluded from seeking relief on the facts currently alleged in the complaint. I would at least vacate the judgment below and remand for explanation by the Court of Appeal as to the precise basis for its judgment.

JUSTICE REHNQUIST, with whom JUSTICE POWELL joins, dissenting.

I agree with JUSTICE WHITE that the Court of Appeal's opinion is best read as rejecting appellant's allegations as a matter of substantive takings law; that appellant sufficiently alleged a final decision denying it all beneficial use of its property; that a land use regulation restricting the use of property may amount to a taking; and that the allegations here are sufficient to state a takings claim. Accordingly, I join Parts I, II, and III of his dissenting opinion. As JUSTICE WHITE recognizes in Part IV of his opinion, the questions surrounding what compensation, if any, is due a property owner in the context of "interim" takings are multifaceted and difficult. I would not reach these questions without first permitting the courts below to address them in light of the fact that appellant has sufficiently alleged a taking.

KIMMELMAN, ATTORNEY GENERAL OF NEW JERSEY, ET AL. v. MORRISON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-1661. Argued March 5, 1986—Decided June 26, 1986

At respondent's bench trial in a New Jersey court resulting in his conviction of rape, a police officer testified that a few hours after the rape she accompanied the victim to respondent's apartment where the rape had occurred; that he was not there but another tenant let them into respondent's apartment; and that the officer seized a sheet from respondent's bed. At such point in the testimony, respondent's counsel sought to suppress introduction of the sheet and any testimony about it on the ground that the officer had seized it without a search warrant in violation of the Fourth Amendment, but the judge ruled that counsel's suppression motion was late under the applicable New Jersey Court Rule. The judge rejected counsel's attempt to justify his omission on the grounds that he had not heard of the seizure until the day before, when the trial began; that it was the State's obligation to inform him of its case, even though he made no pretrial request for discovery, which would have revealed the search and seizure; and that he had not expected to go to trial because he had been told that the victim did not wish to proceed. Respondent retained new counsel after the trial and, on appeal, alleged ineffective assistance of counsel at the trial and error in the trial court's refusal to entertain the suppression motion during the trial. The appellate court rejected the claims and affirmed respondent's conviction. Thereafter respondent unsuccessfully sought postconviction relief from the trial judge on the same grounds. He then obtained habeas corpus relief in Federal District Court, which held, *inter alia*, that he had established his ineffective-assistance claim. The Court of Appeals concluded that *Stone* v. *Powell*, 428 U. S. 465—which held that federal courts should withhold habeas review where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim—should not be extended to bar federal habeas consideration of Sixth Amendment claims based on counsel's alleged failure competently to litigate Fourth Amendment claims. Reviewing the District Court's determination of ineffective assistance under the test established by the intervening decision in *Strickland* v. *Washington*, 466 U. S. 668—which held that, to establish ineffective assistance, the defendant must prove both incompetence of counsel and prejudice—the Court of Appeals determined that respondent's trial counsel had been "grossly ineffective," but vacated and remanded for the District Court to consider whether, under the standards set forth in *Strickland*, respondent had been prejudiced by his attorney's incompetence.

Held:

1. The restriction on federal habeas review of Fourth Amendment claims announced in *Stone* v. *Powell*, *supra*, does not extend to Sixth Amendment ineffective-assistance-of-counsel claims which are founded primarily on incompetent representation with respect to a Fourth Amendment issue. Federal courts may grant habeas relief in appropriate cases, regardless of the nature of the underlying attorney error. Pp. 373–383.

(a) Respondent's Sixth Amendment claim is not in fact a Fourth Amendment claim directly controlled by *Stone*, as petitioners assert. The two claims are distinct, both in nature and in the requisite elements of proof. Pp. 374–375.

(b) Nor are the rationale and purposes of *Stone* fully applicable to a Sixth Amendment claim that is based principally on defense counsel's failure to litigate a Fourth Amendment claim competently. *Stone* held that the remedy for Fourth Amendment violations provided by the exclusionary rule is not a personal constitutional right, but instead is predominately a judicially created structural remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect; the rule has minimal utility in the context of federal collateral proceedings. Here, respondent sought direct federal habeas protection of his fundamental personal right to effective assistance of counsel, and collateral review is frequently the only means through which an accused can effectuate that right. Moreover, there is no merit to the contention that a defendant should not be allowed to vindicate through federal habeas review his right to effective assistance of counsel where counsel's primary error is failure to make a timely request for the exclusion of illegally seized evidence that is often the most probative information bearing on the defendant's guilt or innocence. The right to counsel is not conditioned upon actual innocence. Pp. 375–380.

(c) Petitioners' prediction that every Fourth Amendment claim that fails in state court will be fully litigated in federal habeas proceedings in Sixth Amendment guise, and that, as a result, many state-court judgments will be disturbed, is incorrect because it ignores the rigorous standard which *Strickland* v. *Washington*, *supra*, erects for ineffective-assistance claims. Although a meritorious Fourth Amendment issue is necessary to the success of a Sixth Amendment claim like respondent's, a good Fourth Amendment claim alone will not earn a prisoner federal habeas relief. Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys are entitled to the writ and to retrial without the challenged evidence. Pp. 380–382.

2. Respondent satisfied the incompetence prong of the test for ineffective assistance of counsel set forth in *Strickland*, and the Court of Appeals did not err in remanding the case to the District Court for a determination of prejudice under *Strickland*'s standard. Pp. 383–391.

(a) While the failure to file a suppression motion does not constitute *per se* ineffective assistance of counsel, the record clearly reveals that respondent's attorney failed to file a timely suppression motion, not due to trial strategy considerations, but because he was unaware of the search, and of the State's intention to introduce the bedsheet into evidence, due to his failure to conduct any pretrial discovery. Such failure here was not, as required under *Strickland*, reasonable and in accord with prevailing professional norms. Pp. 383–387.

(b) With respect to the prejudice prong of the *Strickland* test, there is no merit to petitioners' contention that a statement made by the trial judge at a post-trial hearing on respondent's motion for bail pending appeal constituted a finding that even if the bedsheet had been excluded, he would have found respondent guilty, and that such finding was a subsidiary finding of historical fact that respondent was not prejudiced by his attorney's incompetence, entitled under 28 U. S. C. § 2254(d) to a presumption of correctness in federal habeas proceedings. The record here is not sufficiently complete to enable this Court to apply *Strickland*'s prejudice prong directly to the facts of the case, and the remand to the District Court for redetermination of prejudice was proper. Pp. 387–391.

752 F. 2d 918, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 391.

Allan J. Nodes argued the cause for petitioners. With him on the brief were *Irwin I. Kimmelman*, Attorney General of New Jersey, and *Catherine A. Foddai*, *Mildred Vallerini Spiller*, and *Arlene R. Weiss*, Deputy Attorneys General.

William E. Staehle, by appointment of the Court 474 U. S. 917, argued the cause and filed a brief for respondent.*

**Leon Friedman*, *Charles S. Sims*, and *Burt Neuborne* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

JUSTICE BRENNAN delivered the opinion of the Court.

The question we address in this case is whether the restrictions on federal habeas review of Fourth Amendment claims announced in *Stone* v. *Powell*, 428 U. S. 465 (1976), should be extended to Sixth Amendment claims of ineffective assistance of counsel where the principal allegation and manifestation of inadequate representation is counsel's failure to file a timely motion to suppress evidence allegedly obtained in violation of the Fourth Amendment.

I

Respondent, Neil Morrison, was convicted by the State of New Jersey of raping a 15-year-old girl. The case presented by the State at respondent's bench trial consisted of scientific evidence and of the testimony of the victim, her mother, and the police officers who handled the victim's complaint.

The victim testified that Morrison, who was her employer, had taken her to his apartment, where he forced her onto his bed and raped her. Upon returning home, the girl related the incident to her mother, who, after first summoning Morrison and asking for his account of events, phoned the police. The police came to the victim's home and transported her to the hospital, where she was examined and tested for indicia of a sexual assault.

The State also called as a witness Detective Dolores Most, one of the officers who investigated the rape complaint. Most testified that she accompanied the victim to Morrison's apartment building a few hours after the rape. Morrison was not at home, but another tenant in the building let them into respondent's one-room apartment. While there, Most stated, she seized a sheet from respondent's bed.

At this point in the testimony respondent's counsel objected to the introduction of the sheet and to any testimony concerning it on the ground that Most had seized it without a search warrant. New Jersey Court Rules, however, require that suppression motions be made within 30 days of indictment unless the time is enlarged by the trial court for good cause. N. J. Ct. Rule 3:5–7. Because the 30-day deadline had long since expired, the trial judge ruled that counsel's motion was late. Defense counsel explained to the court that he had not heard of the seizure until the day before, when trial began, and that his client could not have known of it because the police had not left a receipt for the sheet. The prosecutor responded that defense counsel, who had been on the case from the beginning, had never asked for *any* discovery. Had trial counsel done so, the prosecutor observed, police reports would have revealed the search and seizure. The prosecutor stated further that one month before trial he had sent defense counsel a copy of the laboratory report concerning the tests conducted on stains and hairs found on the sheets.

Asked repeatedly by the trial court why he had not conducted any discovery, respondent's attorney asserted that it was the State's obligation to inform him of its case against his client, even though he made no request for discovery. The judge rejected this assertion and stated: "I hate to say it, but I have to say it, that you were remiss. I think this evidence was there and available to you for examination and inquiry." 2 Tr. 114. Defense counsel then attempted to justify his omission on the ground that he had not expected to go to trial because he had been told that the victim did not wish to proceed. The judge rejected this justification also, reminding counsel that once an indictment is handed down, the decision to go through with the complaint no longer belongs to the victim, and that it requires a court order to dismiss an indictment. *Id.*, at 115. While the judge agreed that defense counsel had "br[ought] about a very valid basis . . . for suppression . . . if the motion had been brought and timely made," he refused "to entertain a motion to suppress in the middle of the trial." *Id.*, at 110.

The State then called a number of expert witnesses who had conducted laboratory tests on the stains and hairs found on the sheet, on a stain found on the victim's underpants, and on blood and hair samples provided by the victim and respondent. This testimony established that the bedsheet had been stained with semen from a man with type O blood, that the stains on the victim's underwear similarly exhibited semen from a man with type O blood, that the defendant had type O blood, that vaginal tests performed on the girl at the hospital demonstrated the presence of sperm, and that hairs recovered from the sheet were morphologically similar to head hair of both Morrison and the victim. Defense counsel aggressively cross-examined all of the expert witnesses.

The defense called four friends and acquaintances of the defendant and the defendant himself in an attempt to establish a different version of the facts. The defense theory was that the girl and her mother fabricated the rape in order to punish respondent for being delinquent with the girl's wages. According to Morrison, the girl and her mother had not intended to go through with the prosecution, but ultimately they found it impossible to extricate themselves from their lies. Morrison admitted that he had taken the girl to his apartment, but denied having had intercourse with her. He claimed that his sexual activity with other women accounted for the stains on his sheet, and that a hair from the girl's head was on his sheet because she had seated herself on his bed. Defense counsel also implied that the girl's underwear and vaginal secretions tested positive for semen and sperm because she probably had recently engaged in relations with the father of her baby. Counsel did not, however, call the girl's boyfriend to testify or have him tested for blood type, an omission upon which the prosecution commented in closing argument.

The trial judge, in rendering his verdict, noted: "As in most cases nothing is cut and dry. There are discrepancies in the State's case, there are discrepancies in the defense as it's presented." 6 Tr. 86. After pointing out some of the more troublesome inconsistencies in the testimony of several of the witnesses, the judge declared his conclusion that the State had proved its case beyond a reasonable doubt.

After trial, respondent dismissed his attorney and retained new counsel for his appeal. On appeal, respondent alleged ineffective assistance of counsel and error in the trial court's refusal to entertain the suppression motion during trial. The appeals court announced summarily that it found no merit in either claim and affirmed respondent's conviction. The Supreme Court of New Jersey subsequently denied respondent's petition for discretionary review. Respondent then sought postconviction relief in the New Jersey Superior Court, from the same judge who had tried his case. There Morrison presented the identical issues he had raised on direct appeal. The court denied relief on the ground that it was bound by the appellate court's resolution of those issues against respondent.

Respondent then sought a writ of habeas corpus in Federal District Court, again raising claims of ineffective assistance of counsel and erroneous admission of illegally seized evidence. The District Court ruled that because respondent did not allege that the State had denied him an opportunity to litigate his Fourth Amendment claim fully and fairly, direct consideration of this claim on federal habeas review was barred by *Stone* v. *Powell*, 428 U. S. 465 (1976). 579 F. Supp. 796 (NJ 1984). The District Court did find respondent's ineffective-assistance claim meritorious.

Because the District Court rendered its decision before this Court announced the standards to be applied to claims of constitutionally deficient representation in *Strickland* v. *Washington*, 466 U. S. 668 (1984), the District Court relied on Third Circuit precedent for guidance, particularly *United States* v. *Baynes*, 687 F. 2d 659 (1982), and *Moore* v. *United States*, 432 F. 2d 730 (1970). Like *Strickland*, these cases required a two-pronged inquiry into counsel's competence and into the prejudicial effect of counsel's unprofessional errors. With respect to trial counsel's competence, the District Court used as its standard the "'customary skill and knowledge which normally prevails at the time and place.'" 579 F. Supp., at 802 (quoting *Moore, supra,* at 736). Noting that this standard "'entails a careful inquiry into the particular circumstances surrounding each case,'" 579 F. Supp., at 802 (quoting *Baynes, supra,* at 665), the court concluded:

> "[C]ounsel failed to conduct any meaningful pretrial discovery, and thus was totally unaware that certain damaging evidence might have been the appropriate subject for a suppression motion. Counsel seems to have acted on the misapprehension that the State was obligated to turn over anything that the defense might be interested in examining. Little else was offered by way of excuse by [Morrison's] lawyer in the face of repeated criticism by the state trial judge, except for counsel's rather remarkable attempt to justify his conduct by noting that up until trial he had been told that the victim 'didn't want to go ahead with this case.' . . . Based on the unmitigated negligence of petitioner's trial counsel in failing to conduct any discovery, combined with the likelihood of success of a suppression motion had it been timely made, we find that petitioner was deprived of effective representation." 579 F. Supp., at 802–803.

The District Court then determined that, measured by the harmless-beyond-a-reasonable-doubt standard prescribed by *Baynes, supra,* respondent had been prejudiced by counsel's ineffectiveness and issued a conditional writ of habeas corpus ordering Morrison's release unless New Jersey should retry him.

Although the District Court did not address the relevance of *Stone, supra,* to respondent's Sixth Amendment ineffective-assistance-of-counsel claim, the Court of Appeals did. Relying on both the language of *Stone* and the different natures of Fourth and Sixth Amendment claims, the Court of

Appeals concluded that *Stone* should not be extended to bar federal habeas consideration of Sixth Amendment claims based on counsel's alleged failure competently to litigate Fourth Amendment claims. 752 F. 2d 918 (1985). Because *Strickland* had recently been decided by this Court, the Court of Appeals reviewed the District Court's determination of ineffective assistance under *Strickland*'s test. The Court of Appeals determined that respondent's trial counsel had been "grossly ineffective," 752 F. 2d, at 922, but vacated and remanded for the District Court to consider whether, under the standards set forth in *Strickland, supra*, respondent had been prejudiced by his attorney's incompetence.

Petitioners, the Attorney General of New Jersey and the Superintendent of Rahway State Prison, petitioned for certiorari. We granted their petition, 474 U. S. 815 (1985), and now affirm.

II

Petitioners urge that the Sixth Amendment veil be lifted from respondent's habeas petition to reveal what petitioners argue it really is—an attempt to litigate his defaulted Fourth Amendment claim. They argue that because respondent's claim is in fact, if not in form, a Fourth Amendment one, *Stone* directly controls here. Alternatively, petitioners maintain that even if Morrison's Sixth Amendment claim may legitimately be considered distinct from his defaulted Fourth Amendment claim, the rationale and purposes of *Stone* are fully applicable to ineffective-assistance claims where the principal allegation of inadequate representation is counsel's failure to file a timely motion to suppress evidence allegedly obtained in violation of the Fourth Amendment. *Stone*, they argue, will be emasculated unless we extend its bar against federal habeas review to this sort of Sixth Amendment claim. Finally, petitioners maintain that consideration of defaulted Fourth Amendment claims in Sixth Amendment federal collateral proceedings would violate principles of comity and federalism and would seriously interfere with the State's interest in the finality of its criminal convictions.[1]

A

We do not share petitioners' perception of the identity between respondent's Fourth and Sixth Amendment claims. While defense counsel's failure to make a timely suppression motion is the primary manifestation of incompetence and source of prejudice advanced by respondent, the two claims are nonetheless distinct, both in nature and in the requisite elements of proof.

Although it is frequently invoked in criminal trials, the Fourth Amendment is not a trial right; the protection it affords against governmental intrusion into one's home and affairs pertains to all citizens. The gravamen of a Fourth Amendment claim is that the complainant's legitimate expectation of privacy has been violated by an illegal search or seizure. See, *e. g.*, *Katz* v. *United States*, 389 U. S. 347 (1967). In order to prevail, the complainant need prove only that the search or seizure was illegal and that it violated his reasonable expectation of privacy in the item or place at issue. See, *e. g.*, *Rawlings* v. *Kentucky*, 448 U. S. 98, 104 (1980).

The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process. *E. g.*, *Gideon* v. *Wainwright*, 372 U. S. 335, 344 (1963). The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect. See, *e. g.*, *Strickland* v. *Washington*, 466 U. S., at 686; *United States* v. *Cronic*, 466 U. S. 648,

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[1] Petitioners also argue that because respondent's Fourth Amendment claim was procedurally defaulted by his trial lawyer's failure to file a timely suppression motion, any Sixth Amendment claim based on this failure is similarly defaulted. We disagree. Respondent's Sixth Amendment claim is distinct from his Fourth Amendment claim and has never been defaulted.

655–657 (1984). In order to prevail, the defendant must show both that counsel's representation fell below an objective standard of reasonableness, *Strickland*, 466 U. S., at 688, and that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*, at 694. Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. Thus, while respondent's defaulted Fourth Amendment claim is one element of proof of his Sixth Amendment claim, the two claims have separate identities and reflect different constitutional values.

B

We also disagree with petitioners' contention that the reasoning and purposes of *Stone* are fully applicable to a Sixth Amendment claim which is based principally on defense counsel's failure to litigate a Fourth Amendment claim competently.

At issue in *Stone* was the proper scope of federal collateral protection of criminal defendants' right to have evidence, seized in violation of the Fourth Amendment, excluded at trial in state court. In determining that federal courts should withhold habeas review where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Court found it crucial that the remedy for Fourth Amendment violations provided by the exclusionary rule "is not a personal constitutional right." 428 U. S., at 486; see also *id.*, at 495, n. 37. The Court expressed the understanding that the rule "is not calculated to redress the injury to the privacy of the victim of the search or seizure," *id.*, at 486; instead, the Court explained, the exclusionary rule is predominately a "'judicially created'" structural remedy "'designed to safeguard Fourth Amendment rights generally through its deterrent effect.'" *Ibid.* (quoting *United States* v. *Calandra*, 414 U. S. 338, 348 (1974)).

The Court further noted that "[a]s in the case of any remedial device, 'the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served,'" 428 U. S., at 486–487 (quoting *Calandra*, *supra*, at 348), and that the rule has not been extended to situations such as grand jury proceedings, 428 U. S., at 486–487, (citing *Calandra*, *supra*), and impeachment of a defendant who testifies broadly in his own behalf, 428 U. S., at 488 (citing *Walder* v. *United States*, 347 U. S. 62 (1954)), where the rule's costs would outweigh its utility as a deterrent to police misconduct. Applying this "pragmatic analysis," 428 U. S., at 488, to the question whether prisoners who have been afforded a full and fair opportunity in state court to invoke the exclusionary rule may raise their Fourth Amendment claims on federal habeas review, the Court determined that they may not. While accepting that the exclusionary rule's deterrent effect outweighs its costs when enforced at trial and on direct appeal, the Court found any "additional contribution . . . of the consideration of search-and-seizure claims . . . on collateral review," *id.*, at 493, to be too small in relation to the costs to justify federal habeas review. *Id.*, at 492–495.

In *Stone* the Court also made clear that its "decision . . . [was] *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally." *Id.*, at 495, n. 37 (emphasis in original). Rather, the Court simply "reaffirm[ed] that the exclusionary rule is a judicially created remedy rather than a personal constitutional right . . . and . . . emphasiz[ed] the minimal utility of the rule" in the context of federal collateral proceedings. *Ibid.* See also *Rose* v. *Mitchell*, 443 U. S. 545, 560 (1979) ("In *Stone* v. *Powell* . . . the Court carefully limited the reach of its opinion . . . to cases involving the judicially created exclusionary rule, which had minimal utility when applied in a habeas corpus proceeding"); *Jackson* v. *Virginia*, 443 U. S. 307, 323 (1979) (declining to extend *Stone* to claims by state prisoners that, in violation of the constitutional standard set forth in *In re Winship*, 397 U. S. 358 (1970), the evidence in support of their convictions was not sufficient to permit a rational trier of fact to find guilt beyond a reasonable doubt).

In contrast to the habeas petitioner in *Stone*, who sought merely to avail himself of the exclusionary rule, Morrison seeks direct federal habeas protection of his personal right to effective assistance of counsel.

The right of an accused to counsel is beyond question a fundamental right. See, *e. g.*, *Gideon*, 372 U. S., at 344 ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours"). Without counsel the right to a fair trial itself would be of little consequence, see, *e. g.*, *Cronic*, *supra*, at 653; *United States* v. *Ash*, 413 U. S. 300, 307–308 (1973); *Argersinger* v. *Hamlin*, 407 U. S. 25, 31–32 (1972); *Gideon*, *supra*, at 343–345; *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463 (1938); *Powell* v. *Alabama*, 287 U. S. 45, 68–69 (1932), for it is through counsel that the accused secures his other rights. *Maine* v. *Moulton*, 474 U. S. 159, 168–170 (1985); *Cronic*, *supra*, at 653; see also, Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956) ("Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have"). The constitutional guarantee of counsel, however, "cannot be satisfied by mere formal appointment," *Avery* v. *Alabama*, 308 U. S. 444, 446 (1940). "An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland*, *supra*, at 685. In other words, the right to counsel is the right to effective assistance of counsel. *Evitts* v. *Lucey*, 469 U. S. 387, 395–396 (1985); *Strickland*, *supra*, at

686; *Cronic*, 466 U. S., at 654; *Cuyler* v. *Sullivan*, 446 U. S. 335, 344 (1980); *McMann* v. *Richardson*, 397 U. S. 759, 771, n. 14 (1970).[2]

Because collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation. A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance, cf. *Powell* v. *Alabama*, *supra*, at 69; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case. Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings, particularly if he retained trial counsel on direct appeal. Were we to extend *Stone* and hold that criminal defendants may not raise ineffective-assistance claims that are based primarily on incompetent handling of Fourth Amendment issues on federal habeas, we would deny most defendants whose trial attorneys performed incompetently in this regard the opportunity to vindicate their right to effective trial counsel. We would deny all defendants whose appellate counsel performed inadequately with respect to Fourth Amendment issues the opportunity to protect their right to effective appellate counsel. See *Evitts*, *supra*. Thus, we cannot say, as the Court was able to say in *Stone*, that restriction of federal habeas review would not severely interfere with the protection of the constitutional right asserted by the habeas petitioner.[3]

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[2] As we held only last Term, the right to effective assistance of counsel is not confined to trial, but extends also to the first appeal as of right. *Evitts* v. *Lucey*, 469 U. S. 387 (1985).

[3] Moreover, the restriction on federal habeas relief established by *Stone* v. *Powell* was predicated on the existence at trial and on direct review of "an opportunity for full and fair litigation" of the constitutional claim ad-

Furthermore, while the Court may be free, under its analysis in *Stone*, to refuse for reasons of prudence and comity[4] to burden the State with the costs of the exclusionary rule in contexts where the Court believes the price of the rule to exceed its utility, the Constitution constrains our ability to allocate as we see fit the costs of ineffective assistance. The Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel. See *Murray* v. *Carrier*, *post*, at 488 (where a "procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State"); *Cuyler*, *supra*, at 344 ("The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance"); see also *Evitts*, *supra*, at 396 ("The constitutional mandate is addressed to the action of the State").

We also reject the suggestion that criminal defendants should not be allowed to vindicate through federal habeas review their right to effective assistance of counsel where counsel's primary error is failure to make a timely request for the exclusion of illegally seized evidence—evidence which is "typically reliable and often the most probative information bearing on the guilt or innocence of the defendant." *Stone*, 428 U. S., at 490. While we have recognized that the "'premise of our adversary system of criminal justice . . . that partisan advocacy . . . will best promote the ultimate objective that the guilty be convicted and the innocent go

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vanced by the habeas petitioner. 428 U. S. 465, 494 (1976). In general, no comparable, meaningful opportunity exists for the full and fair litigation of a habeas petitioner's ineffective-assistance claims at trial and on direct review.

[4] The Court made clear in *Stone* that it rested its holding on prudential, rather than jurisdictional, grounds. *Id.*, at 495, n. 37 ("Our decision does not mean that the federal court lacks jurisdiction over . . . [a Fourth Amendment] claim, but only that the application of the [exclusionary] rule is limited").

free,'" *Evitts*, 469 U. S., at 394, quoting *Herring* v. *New York*, 422 U. S. 853, 862 (1975), underlies and gives meaning to the right to effective assistance, *Cronic*, *supra*, at 655–656, we have never intimated that the right to counsel is conditioned upon actual innocence. The constitutional rights of criminal defendants are granted to the innocent and the guilty alike. Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt.[5] Furthermore, petitioners do not suggest that an ineffective-assistance claim asserted on direct review would fail for want of actual prejudice whenever counsel's primary error is failure to make a meritorious objection to the admission of reliable evidence the exclusion of which might have affected the outcome of the proceeding. We decline to hold that the scope of the right to effective assistance of counsel is altered in this manner simply because the right is asserted on federal habeas review rather than on direct review.

C

Stone's restriction on federal habeas review, petitioners warn, will be stripped of all practical effect unless we extend it to Sixth Amendment claims based principally on defense counsel's incompetent handling of Fourth Amendment issues. Petitioners predict that every Fourth Amendment claim that fails or is defaulted in state court will be fully litigated in federal habeas proceedings in Sixth Amendment guise and that, as a result, many state-court judgments will be disturbed.

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[5] As we observed in *Powell* v. *Alabama*, 287 U. S. 45 (1932), the layman defendant "requires the guiding hand of counsel at *every* step in the proceedings against him." *Id.*, at 69 (emphasis added). We noted:

"If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one." *Ibid.*

They seem to believe that a prisoner need only allege ineffective assistance, and if he has an underlying, meritorious Fourth Amendment claim, the writ will issue and the State will be obligated to retry him without the challenged evidence. Because it ignores the rigorous standard which *Strickland* erected for ineffective-assistance claims, petitioners' forecast is simply incorrect.

In order to establish ineffective representation, the defendant must prove both incompetence and prejudice.[6] 466 U. S., at 688. There is a strong presumption that counsel's performance falls within the "wide range of professional assistance," *id.*, at 689; the defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy. *Id.*, at 688–689. The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential. *Id.*, at 689. The defendant shows that he was prejudiced by his attorney's ineffectiveness by demonstrating that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. See also, *id.*, at 695 (Where a defendant challenges his conviction, he must show that there exists "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt"). And, in determining the existence *vel non* of prejudice, the court "must consider the totality of the evidence before the judge or jury." *Ibid.*

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[6] We refer here only to cases in which the defendant alleges "actual" ineffective assistance rather than the few contexts where ineffective assistance is "presumed," such as where counsel is either totally absent or prevented from assisting the accused during a critical stage of the proceeding, see, *e. g., United States* v. *Cronic*, 466 U. S. 648, 659, n. 25 (1984); *Strickland*, 466 U. S., at 692, and where counsel is burdened by an actual conflict of interest. *Ibid.; Cuyler* v. *Sullivan*, 446 U. S. 335, 345–350 (1980).

As is obvious, *Strickland*'s standard, although by no means insurmountable, is highly demanding. More importantly, it differs significantly from the elements of proof applicable to a straightforward Fourth Amendment claim. Although a meritorious Fourth Amendment issue is necessary to the success of a Sixth Amendment claim like respondent's, a good Fourth Amendment claim alone will not earn a prisoner federal habeas relief. Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ and will be entitled to retrial without the challenged evidence.[7]

D

In summary, we reject petitioners' argument that *Stone*'s restriction on federal habeas review of Fourth Amendment claims should be extended to Sixth Amendment ineffective-assistance-of-counsel claims which are founded primarily on incompetent representation with respect to a Fourth Amendment issue. Where a State obtains a criminal conviction in a trial in which the accused is deprived of the effective assistance of counsel, the "State . . . unconstitutionally deprives the defendant of his liberty." *Cuyler*, 446 U. S., at 343. The defendant is thus "in custody in violation of the Constitution," 28 U. S. C. § 2254(a), and federal courts have habeas jurisdiction over his claim. We hold that federal courts may grant habeas relief in appropriate cases, regardless of the nature of the underlying attorney error.

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[7] We have no reason to believe that defense attorneys will "sandbag"—that is, consciously default or poorly litigate their clients' Fourth Amendment claims in state court in the hope of gaining more favorable review of these claims in Sixth Amendment federal habeas proceedings. First, it is virtually inconceivable that an attorney would deliberately invite the judgment that his performance was constitutionally deficient in order to win federal collateral review for his client. Second, counsel's client has little, if anything, to gain and everything to lose through such a strategy. It should be remembered that the only incompetently litigated and defaulted Fourth Amendment claims that could lead to a reversal of the defendant's conviction on Sixth Amendment grounds are potentially outcome-determinative claims. No reasonable lawyer would forgo competent litigation of meritorious, possibly decisive claims on the remote chance that his deliberate dereliction might ultimately result in federal habeas review. Furthermore, when an attorney chooses to default a Fourth Amendment claim, he also loses the opportunity to obtain direct review under the harmless-error standard of *Chapman* v. *California*, 386 U. S. 18 (1967), which requires the State to prove that the defendant was not prejudiced by the error. By defaulting, counsel shifts the burden to the defendant to prove that there exists a reasonable probability that, absent his attorney's incompetence, he would not have been convicted. Cf. Comment, Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee, 50 U. Chi. L. Rev. 1380, 1428, n. 223 (1983).

III

Petitioners also argue that respondent has not satisfied either the performance or the prejudice prong of the test for ineffective assistance of counsel set forth in *Strickland*. We address each component of that test in turn.

A

With respect to the performance component of the *Strickland* test, petitioners contend that Morrison has not overcome the strong presumption of attorney competence established by *Strickland*. While acknowledging that this Court has said that a single, serious error may support a claim of ineffective assistance of counsel, Brief for Petitioners 33, n. 16 (citing *Cronic*, 466 U. S., at 657, n. 20),[8] petitioners argue that the mere failure to file a timely suppression motion alone does not constitute a *per se* Sixth Amendment violation. They maintain that the record "amply reflects that trial counsel crafted a sound trial strategy" and that, "[v]iewed in its entirety, counsel's pretrial investigation, preparation and trial performance were professionally reasonable." Brief for Petitioners 33 (footnotes and citations omitted). While we agree with petitioners' view that the failure to file a suppression motion does not constitute *per se* ineffective assistance of counsel, we disagree with petitioners' assessment of counsel's performance.

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[8] See also *Smith* v. *Murray*, *post*, at 535; *Murray* v. *Carrier*, *post*, at 488.

In *Strickland* we explained that "access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." 466 U. S., at 685 (quoting *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 275, 276 (1942)). "Counsel . . . has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U. S., at 688. Counsel's competence, however, is presumed, *id.*, at 689, and the defendant must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy. *Id.*, at 688–689. The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. *Id.*, at 689. In making the competency determination, the court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.*, at 690. Because that testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies, we noted that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*, at 691. But, we observed, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Ibid.*

The trial record in this case clearly reveals that Morrison's attorney failed to file a timely suppression motion, not due to strategic considerations, but because, until the first day of trial, he was unaware of the search and of the State's intention to introduce the bedsheet into evidence. Counsel was unapprised of the search and seizure because he had conducted no pretrial discovery. Counsel's failure to request discovery, again, was not based on "strategy," but on counsel's mistaken beliefs that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense and that the victim's preferences would determine whether the State proceeded to trial after an indictment had been returned.

Viewing counsel's failure to conduct any discovery from his perspective at the time he decided to forgo that stage of pretrial preparation and applying a "heavy measure of deference," *ibid.*, to his judgment, we find counsel's decision unreasonable, that is, contrary to prevailing professional norms. The justifications Morrison's attorney offered for his omission betray a startling ignorance of the law—or a weak attempt to shift blame for inadequate preparation. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Ibid.* Respondent's lawyer neither investigated, nor made a reasonable decision not to investigate, the State's case through discovery. Such a complete lack of pretrial preparation puts at risk both the defendant's right to an "'ample opportunity to meet the case of the prosecution,'" *id.*, at 685 (quoting *Adams*, *supra*, at 275), and the reliability of the adversarial testing process. See 466 U. S., at 688.

Petitioners attempt to minimize the seriousness of counsel's errors by asserting that the State's case turned far more on the credibility of witnesses than on the bedsheet and related testimony. Consequently, they urge, defense counsel's vigorous cross-examination, attempts to discredit witnesses, and effort to establish a different version of the facts lift counsel's performance back into the realm of professional acceptability.

Strickland requires a reviewing court to "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*, at 690. It will generally be appropriate for a reviewing court to assess counsel's overall performance throughout the case in order to determine whether the "identified acts or omissions" overcome the presumption that counsel rendered reasonable professional assistance. Since "[t]here are countless ways to provide effective assistance in any given case," *id.*, at 689, unless consideration is given to counsel's overall performance, before and at trial, it will be "all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Ibid.*

In this case, however, we deal with a total failure to conduct pretrial discovery, and one as to which counsel offered only implausible explanations. Counsel's performance at trial, while generally creditable enough, suggests no better explanation for this apparent and pervasive failure to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*, at 691. Under these circumstances, although the failure of the District Court and the Court of Appeals to examine counsel's overall performance was inadvisable, we think this omission did not affect the soundness of the conclusion both courts reached—that counsel's performance fell below the level of reasonable professional assistance in the respects alleged.

Moreover, petitioners' analysis is flawed, however, by their use of hindsight to evaluate the relative importance of various components of the State's case. See, *id.*, at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time"). At the time Morrison's lawyer decided not to request any discovery, he did not—and, because he did not ask, could not—know what the State's case would be. While the relative importance of witness credibility vis-à-vis the bedsheet and related expert testimony is pertinent to the determination whether respondent was prejudiced by his attorney's incompetence, it sheds no light on the reasonableness of counsel's decision not to request any discovery. We therefore agree with the District Court and the Court of Appeals that the assistance rendered respondent by his trial counsel was constitutionally deficient.

B

1

Petitioners also argue that respondent suffered no prejudice from his attorney's failure to make a timely suppression motion and that the Third Circuit erred in remanding the case to the District Court for a determination of prejudice under *Strickland*'s standard. The essence of petitioners' argument is that, at a post-trial hearing on respondent's motion for bail pending appeal, the same judge who presided at respondent's trial made a finding of historical fact, which is entitled to a presumption of correctness under 28 U. S. C. § 2254(d). If that finding were presumed correct, petitioners contend that it would be dispositive of the prejudice issue—that is, no court could find that there exists "a reasonable probability that, absent [Morrison's attorney's] errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland,* 466 U. S., at 695. Thus, petitioners conclude, no ground for a remand exists.

In New Jersey, bail after conviction is appropriate where a substantial issue for review exists and where the defendant poses no threat to the community. N. J. Ct. Rule 2:9–4. At Morrison's bail hearing, the public defender representing him informed the judge that because he had not read the trial transcript and was not doing the appeal, he was not entirely sure on what grounds Morrison would appeal. Tr. of Motion for Bail Pending Appeal 7. He did, however, argue that the trial court had committed two legal errors that could present substantial issues for appellate review. Specifically, counsel contended that the court erred in refusing to entertain the midtrial motion to suppress the sheet and that respondent may have been prejudiced by the court's awareness of another pending indictment.

With respect to the court's decision to admit the sheet, Morrison's attorney presented what is most accurately characterized as an abuse-of-discretion argument. He suggested that because trial counsel had been surprised by the introduction of the sheet, the court should have waived the pretrial filing requirement for suppression motions and should have permitted the midtrial motion. *Id.*, at 5. The judge responded to this argument by noting:

> "The matter of the sheet and the tests that resulted therefrom obviously were important, they were not the most important phases of this case by any means.
>
> "Obviously, the most important phases of the case were direct testimony from the victim herself as well as from testimony of witnesses, police, medical examinations, and testimony from the defense, testimony by the defendant. The sheet was just one small phase in this whole case. I do not think that it is such a substantial issue for review by the Appellate Division which would cause or be likely to cause a reversal." *Id.*, at 11.

Petitioners direct our attention to the court's statement that "[t]he sheet was just one small phase in this whole case." *Ibid.* While acknowledging this Court's explanation in *Strickland* that both the performance and the prejudice components of the ineffectiveness test are mixed questions of fact and law and that therefore a state court's ultimate conclusions regarding competence and prejudice are not findings of fact binding on the federal court to the extent stated by

§ 2254(d), see *Strickland*, 466 U. S., at 698, petitioners maintain that this statement constitutes a subsidiary finding of historical fact, entitled to § 2254(d)'s presumption of correctness. See *ibid.* Further, petitioners construe the judge's remark to be a finding that even if the sheet had been excluded, he would have found respondent guilty. So construed and accorded the presumption of correctness, this finding of fact, they argue, prevents a federal court from determining that Morrison was prejudiced by his attorney's incompetence.

We do not agree with petitioners that the statement made by the judge at respondent's bail hearing constitutes a finding of fact which is subject to § 2254(d) deference in this case. Section 2254(d)(1) provides that "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be presumed to be correct" unless "the merits of the factual dispute were not resolved in the State court hearing."[9] The issue respondent places before the federal habeas courts is substantially different from the issue he presented to the judge in the bail hearing. The question before the federal courts is whether a reasonable probability exists that the trial judge would have had a reasonable doubt concerning respondent's guilt if the sheet and related testimony had been excluded. By contrast, the state court was called upon simply to decide whether the argument that the court had abused its discretion in refusing to entertain respondent's suppression motion midtrial raised a substantial issue for appeal on which Morrison was likely to succeed.

Not only was the judge not asked to answer the question presently before the federal courts, he did not answer it. He stated only that while the sheet was an important aspect of the case, it was not the most important aspect. We do not find his remark tantamount to a declaration that he would have found respondent guilty even if the sheet and related expert testimony had not been admitted. If, after saying what he did, the judge had been asked whether he would have had a reasonable doubt concerning Morrison's guilt had the sheet and related testimony been excluded, he could well have answered affirmatively without contradicting his earlier comment. Although the sheet may not have been as important as other components of the State's case, it may have tipped the balance. We simply do not know.

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[9] Subsections (2)–(8) of 28 U. S. C. § 2254(d) establish other exceptions to the general rule that determinations made by a state court after a hearing on the merits of a factual issue are entitled to a presumption of correctness.

Because it cannot fairly be said that the "merits of the factual dispute," § 2254(d)(1), regarding the existence of prejudice were resolved in the bail hearing, we conclude that the statements of the judge regarding the relative importance of the sheet are not findings of fact subject to § 2254(d) deference.[10]

2

Respondent also criticizes the Court of Appeals' decision to remand for redetermination of prejudice. He argues that the record is sufficiently complete to enable this Court to apply *Strickland*'s prejudice prong directly to the facts of his case and urges that we do so.

We decline respondent's invitation. While the existing record proved adequate for our application of *Strickland*'s competency standard, it is incomplete with respect to prejudice. No evidentiary hearing has ever been held on the merits of respondent's Fourth Amendment claim. Because the State has not conceded the illegality of the search and seizure, Tr. of Oral Arg. 11–12, it is entitled to an opportunity to establish that Officer Most's search came within one of the exceptions we have recognized to the Fourth Amendment's prohibition against warrantless searches. Even if not, respondent may be unable to show that absent the evidence concerning the bedsheet there is a reasonable probability that the trial judge would have had a reasonable doubt as to his guilt. If respondent could not make this showing, a matter on which we express no view, there would of course be no need to hold an evidentiary hearing on his Fourth Amendment claim.

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[10] We do not mean to suggest that the comment made by the judge at the bail hearing has absolutely no relevance to the prejudice inquiry; we hold only that his remark is not a finding of fact subject to § 2254(d)'s presumption of correctness.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in the judgment.

I agree that *Stone* v. *Powell*, 428 U. S. 465 (1976), does not bar consideration of respondent's ineffective-assistance-of-counsel claim on federal habeas corpus. That conclusion flows logically from *Stone* and from *Strickland* v. *Washington*, 466 U. S. 668 (1984). The more difficult question is whether the admission of illegally seized but reliable evidence can ever constitute "prejudice" under *Strickland*. There is a strong argument that it cannot. But that argument has neither been raised by the parties nor discussed by the various courts involved in this case. Consequently, the proper course is to reject petitioners' *Stone* v. *Powell* argument and go no further. Though the Court appears to take this course, it employs unnecessarily broad language that may suggest that we have considered and resolved the broader *Strickland* issue in this case. *E. g., ante*, at 379–380. I write separately because that suggestion is mistaken, and also to express my view of the relationship between *Stone* and the Sixth Amendment right to the effective assistance of counsel.

I

Respondent's ineffective-assistance claim is uncomplicated. Respondent argues that his trial counsel incompetently failed to conduct any pretrial discovery. Had counsel conducted discovery, he would have known that the police had seized a bedsheet from respondent's apartment without a warrant. The bedsheet contained hair samples matching hair of both respondent and the rape victim. The sheet also contained semen stains matching those found in the victim's underpants. The State introduced the bedsheet and accompanying expert analysis at trial, and the trial judge denied respondent's belated motion to suppress on the ground that it was untimely. Respondent contends that the sheet would have been excluded on Fourth Amendment grounds had the suppression motion been timely filed. Thus, respondent argues, counsel's failure to conduct discovery led to the admission of evidence that was both damning and excludible.

Petitioners, the Attorney General of New Jersey and the Superintendent of Rahway State Prison, argue that because this claim depends on a violation of the Fourth Amendment, the claim cannot be heard by a federal court on habeas corpus. Petitioners' argument rests on *Stone* v. *Powell*, *supra*, in which we held that Fourth Amendment claims are not cognizable on federal habeas corpus as long as the State provided a full and fair opportunity to litigate those claims in state court.

The Court properly rejects petitioners' argument. *Stone*'s holding derives from two propositions, neither of which applies to a claim of ineffective assistance of counsel. First, we reasoned in *Stone* that the exclusionary rule does not exist to remedy any wrong committed against the defendant, but rather to deter violations of the Fourth Amendment by law enforcement personnel. 428 U. S., at 486–489. Second, we concluded that collateral review of Fourth Amendment claims would add little to the exclusionary rule's deterrent value, but would entail significant costs to federal-state relations and particularly to the public interest in convicting and punishing the guilty. *Id.*, at 493–495.

Ineffective-assistance claims stand on a different footing. As *Strickland* makes clear, the right to effective assistance of counsel is personal to the defendant, and is explicitly tied to the defendant's right to a fundamentally fair trial—a trial in which the determination of guilt or innocence is "just" and "reliable." *Strickland, supra,* at 685–686, 696. See also *United States* v. *Cronic,* 466 U. S. 648, 658 (1984) ("[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial"). A criminal defendant who obtains relief under *Strickland* does not receive a windfall; on the contrary, reversal of such a defendant's conviction is necessary to ensure a fair and just result. *Strickland, supra,* at 685–687. For this reason, *Strickland* explicitly stated that "[t]he principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial." 466 U. S., at 697. *Strickland* thus leaves no room for an argument that *Stone* indirectly bars some ineffective-assistance claims in federal habeas corpus proceedings.

Nor is it possible to conclude that, since the only claimed prejudice is the admission of the illegally seized bedsheet, respondent's claim actually is a Fourth Amendment claim barred by *Stone* directly. As *Strickland* teaches, the right to effective assistance of counsel ensures that defendants have a fair opportunity to contest the charges against them. A defendant has a valid ineffective-assistance claim whenever he has been denied that opportunity, regardless of the law on which counsel's error is based. It follows that respondent's claim must be judged as a Sixth Amendment claim, according to the standards set forth in *Strickland,* and not as a Fourth Amendment claim governed by *Stone.*[1]

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[1] For the same reason, petitioners' argument that respondent's claim is barred by *Wainwright* v. *Sykes,* 433 U. S. 72 (1977), lacks merit. The gist of this argument is that respondent failed timely to raise his Fourth Amendment claim on direct appeal, and thereby forfeited the right to rely on any Fourth Amendment violation on collateral review. The argument ignores the fact that respondent's claim is not that evidence was admitted at trial in violation of the Fourth Amendment's exclusionary rule, but rather that his counsel's failure to so argue, together with counsel's failure

II

Applying *Strickland*, respondent must show both that his counsel fell below basic standards of competence and that he was sufficiently prejudiced by the resulting errors. *Strickland*, 466 U. S., at 687. Petitioners contend that trial counsel's errors were not egregious enough to satisfy *Strickland*'s performance prong. In addition, they argue that the trial judge's comments at a bail hearing constitute a factual finding that those errors were not prejudicial. The Court correctly finds that both arguments are mistaken. This holding disposes of the only claims petitioners make with respect to the legal standards for ineffective-assistance claims.

There is a far more serious argument that petitioners do *not* make, and that no court in this case has addressed. Respondent's sole claim of prejudice stems from the admission of evidence that is concededly reliable although arguably inadmissible under *Mapp* v. *Ohio*, 367 U. S. 643 (1961), and its progeny. The parties and the courts below have assumed that if the evidence in question was in fact inadmissible, and if there is a "reasonable probability" that its use at trial affected the verdict, *Strickland*'s prejudice prong is satisfied. Cf. *Strickland*, 466 U. S., at 695. In my view, that assumption is not justified. In *Strickland* we emphasized that ineffective-assistance claims were designed to protect defendants against fundamental unfairness. "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Id.*, at 685. See also *id.*, at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a

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to conduct pretrial discovery, deprived him of his Sixth Amendment right to effective assistance of counsel. The two claims are distinct.

just result"). Accordingly, we cautioned that the "reasonable probability" test should not be applied too mechanically:

> "A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.*" *Id.*, at 696 (emphasis added).

This reasoning strongly suggests that only errors that call into question the basic justice of the defendant's conviction suffice to establish prejudice under *Strickland*. The question, in sum, must be whether the particular harm suffered by the defendant due to counsel's incompetence rendered the defendant's trial fundamentally unfair. See *id.*, at 687 (prejudice "requires [a] showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable").[2]

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[2] Cf. *United States* v. *Cronic*, 466 U. S. 648 (1984). In *Cronic*, we held that prejudice may be presumed in some kinds of extreme circumstances, as when counsel is given no time to prepare a defense. See *id.*, at 660-661 (discussing *Powell* v. *Alabama*, 287 U. S. 45 (1932)). In such circumstances, the defendant is in effect deprived of counsel altogether, and thereby deprived of any meaningful opportunity to subject the State's evidence to adversarial testing. Prejudice is presumed for the same reason as it is presumed under *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). See *Chapman* v. *California*, 386 U. S. 18, 23, n. 8 (1967) (recognizing that denial of counsel at trial could never be harmless error).

As many of our cases indicate, the admission of illegally seized but reliable evidence does not lead to an unjust or fundamentally unfair verdict. We have held repeatedly that such evidence ordinarily is excluded only for deterrence reasons that have no relation to the fairness of the defendant's trial. *United States* v. *Leon*, 468 U. S. 897, 906 (1984); *Stone* v. *Powell*, 428 U. S., at 486–488; *United States* v. *Calandra*, 414 U. S. 338, 348 (1974). Indeed, it has long been clear that exclusion of illegally seized but wholly reliable evidence renders verdicts *less* fair and just, because it "deflects the truthfinding process and often frees the guilty." *Stone* v. *Powell*, 428 U. S., at 490. See also *id.*, at 540 (WHITE, J., dissenting) (noting that often "the only consequence" of exclusion "is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of proceedings is substantially impaired or a trial totally aborted"). Thus, the harm suffered by respondent in this case is not the denial of a fair and reliable adjudication of his guilt, but rather the absence of a windfall.[3] Because the fundamental fairness of the trial is not affected, our reasoning in *Strickland* strongly suggests that such harm does not amount to prejudicial ineffective assistance of counsel under the Sixth Amendment.

Common sense reinforces this conclusion. As we emphasized only last Term, and as the Court recognizes again today, *ante*, at 379–380, "'[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote *the ultimate objective that the guilty be convicted and the innocent go free.*'" *Evitts* v. *Lucey*, 469 U. S. 387, 394 (1985) (emphasis added), quoting *Herring* v. *New York*, 422 U. S. 853, 862 (1975). The right to effective assistance of counsel flows logically from this premise. But it would shake that right loose from its constitutional moorings to hold that the Sixth Amendment protects criminal defendants against errors that merely deny those defendants a windfall. In this case, for example, the bedsheet may have provided critical evidence of respondent's guilt, evidence whose relevance and reliability cannot seriously be questioned. The admission of the bedsheet thus harmed respondent only in the sense that it helped the factfinder make a well-informed determination of respondent's guilt or innocence. In my view, nothing in *Strickland* compels us to conclude that such an "injury" establishes prejudice for purposes of respondent's ineffective assistance claim.

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[3] See Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 389 (1964) ("Granted that so many criminals must go free as will deter the constables from blundering, pursuance of this policy of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest"), quoted in *Stone* v. *Powell*, 428 U. S., at 487, n. 24.

I nevertheless do not vote to reverse the Court of Appeals, because neither the parties nor the courts below have considered the question I raise here. Nor do the questions presented in the petition for certiorari encompass this aspect of *Strickland*'s application.[4] I raise the issue only because the Court's rhetoric might mistakenly be read to answer a question that has not been asked. *E. g., ante*, at 380 ("[W]e decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt"). Courts and litigants should not be deceived by such pronouncements. Notwithstanding its broad language, the Court explicitly recognizes that the general applicability of *Strickland* in this context has not been discussed by the parties, *ante*, at 380, and limits itself to holding that the right to effective assistance of counsel is equally enforceable on direct appeal and on federal collateral review. *Ante*, at 382–383. Thus, the question whether *Strickland* prejudice encompasses the admission of reliable but illegally obtained evidence remains an open one that can be considered on remand in this case.

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[4] The questions presented ask (1) "[w]hether *Stone* v. *Powell* bars a claim of ineffective assistance of counsel on habeas corpus" where the basis for the claim is a failure to make a Fourth Amendment suppression motion at trial; (2) whether such a claim is barred by *Wainwright* v. *Sykes* where the Fourth Amendment issue was not preserved at trial; and (3) whether the Court of Appeals gave sufficient weight to certain supposed factual findings of the state trial judge. Pet. for Cert. i.

Because I agree that *Stone* v. *Powell* does not govern this case, I concur in the judgment. I leave the application of *Strickland*'s prejudice prong to claims such as this one to another day.

FORD *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-5542. Argued April 22, 1986—Decided June 26, 1986

In 1974, petitioner was convicted of murder in a Florida state court and sentenced to death. There is no suggestion that he was incompetent at the time of the offense, at trial, or at sentencing. But subsequently he began to manifest changes in behavior, indicating a mental disorder. This led to extensive separate examinations by two psychiatrists at his counsel's request, one of whom concluded that petitioner was not competent to suffer execution. Counsel then invoked a Florida statute governing the determination of a condemned prisoner's competency. Following the statutory procedures, the Governor appointed three psychiatrists, who together interviewed petitioner for 30 minutes in the presence of eight other people, including petitioner's counsel, the State's attorneys, and correctional officials. The Governor's order directed that the attorneys should not participate in the examination in any adversarial manner. Each psychiatrist filed a separate report with the Governor, to whom the statute delegates the final decision. The reports reached conflicting diagnoses but were in accord on the question of petitioner's competency. Petitioner's counsel then attempted to submit to the Governor other written materials, including the reports of the two psychiatrists who had previously examined petitioner, but the Governor's office refused to inform counsel whether the submission would be considered. The Governor subsequently signed a death warrant without explanation or statement. After unsuccessfully seeking a hearing in state court to determine anew petitioner's competency, his counsel filed a habeas corpus proceeding in Federal District Court, seeking an evidentiary hearing, but the court denied the petition without a hearing, and the Court of Appeals affirmed.

Held: The judgment is reversed, and the case is remanded.

752 F. 2d 526, reversed and remanded.

JUSTICE MARSHALL delivered the opinion of the Court with respect to Parts I and II, concluding that the Eighth Amendment prohibits the State from inflicting the death penalty upon a prisoner who is insane. The reasons at common law for not condoning the execution of the insane—that such an execution has questionable retributive value, presents no example to others and thus has no deterrence value, and simply offends humanity—have no less logical, moral, and practical force at present. Whether the aim is to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment. Pp. 405–410.

JUSTICE MARSHALL, joined by JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS, concluded in Parts III, IV, and V, that Florida's statutory procedures for determining a condemned prisoner's sanity provide inadequate assurance of accuracy to satisfy the requirement of *Townsend* v. *Sain*, 372 U. S. 293, and that, having been denied a factfinding procedure "adequate to afford a full and fair hearing" on the critical issue as required by 28 U. S. C. § 2254(d)(2), petitioner is entitled to a *de novo* evidentiary hearing in the District Court on the question of his competence to be executed. Pp. 410–418.

(a) No state court has issued any determination to which the presumption of correctness under § 2254(d) could attach, and indeed no state court played any role in the rejection of petitioner's claim of insanity. P. 410.

(b) The first defect in Florida's procedures is the failure to include the prisoner in the truth-seeking process. Any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate. A related flaw in the procedures is the denial of any opportunity to challenge or impeach the state-appointed psychiatrists' opinions, thus creating a significant possibility that the ultimate decision made in reliance on those experts will be distorted. And perhaps the most striking defect in the procedures is the placement of the ultimate decision wholly within the Executive Branch. The Governor, who appoints the experts and ultimately decides whether the State will be able to carry out the death sentence and whose subordinates have been responsible for initiating every stage of the prosecution, cannot be said to have the neutrality that is necessary for reliability in the factfinding proceedings. Pp. 413–416.

JUSTICE POWELL concluded that the test for whether a prisoner is insane for Eighth Amendment purposes is whether the prisoner is aware of his impending execution and of the reason for it. He further concluded that petitioner's claim falls within this definition, and that because petitioner's claim was not adjudicated fairly within the meaning of due process or of 28 U. S. C. § 2254(d), petitioner is entitled to have his claim adjudicated on remand by the District Court. Finally, he concluded that the States could satisfy due process by providing an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence. Beyond these requirements, the States retain substantial discretion to create appropriate procedures. Pp. 419–427.

MARSHALL, J., announced the judgment of the Court and delivered an opinion of the Court with respect to Parts I and II, in which BRENNAN, BLACKMUN, POWELL, and STEVENS, JJ., joined, and an opinion with respect to Parts III, IV, and V, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 418. O'CONNOR, J., filed an opinion concurring in the result in part and dissenting in part, in which WHITE, J., joined, *post*, p. 427. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 431.

Richard H. Burr III argued the cause for petitioner. With him on the briefs were *Richard L. Jorandby*, *Craig S. Barnard*, and *Laurin A. Wollan, Jr.*

Joy B. Shearer, Assistant Attorney General of Florida, argued the cause for respondent. With her on the brief was *Jim Smith*, Attorney General.*

JUSTICE MARSHALL announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II and an opinion with respect to Parts III, IV, and V, in which JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join.

For centuries no jurisdiction has countenanced the execution of the insane, yet this Court has never decided whether the Constitution forbids the practice. Today we keep faith with our common-law heritage in holding that it does.

I

Alvin Bernard Ford was convicted of murder in 1974 and sentenced to death. There is no suggestion that he was incompetent at the time of his offense, at trial, or at sentenc-

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*Briefs of *amici curiae* urging reversal were filed for the American Psychiatric Association by *Joel I. Klein* and *Robert D. Luskin;* for the American Psychological Association et al. by *Donald N. Bersoff* and *Bruce J. Ennis, Jr.;* and for the Capital Collateral Representative et al. by *Sanford L. Bohrer.*

ing. In early 1982, however, Ford began to manifest gradual changes in behavior. They began as an occasional peculiar idea or confused perception, but became more serious over time. After reading in the newspaper that the Ku Klux Klan had held a rally in nearby Jacksonville, Florida, Ford developed an obsession focused upon the Klan. His letters to various people reveal endless brooding about his "Klan work," and an increasingly pervasive delusion that he had become the target of a complex conspiracy, involving the Klan and assorted others, designed to force him to commit suicide. He believed that the prison guards, part of the conspiracy, had been killing people and putting the bodies in the concrete enclosures used for beds. Later, he began to believe that his women relatives were being tortured and sexually abused somewhere in the prison. This notion developed into a delusion that the people who were tormenting him at the prison had taken members of Ford's family hostage. The hostage delusion took firm hold and expanded, until Ford was reporting that 135 of his friends and family were being held hostage in the prison, and that only he could help them. By "day 287" of the "hostage crisis," the list of hostages had expanded to include "senators, Senator Kennedy, and many other leaders." App. 53. In a letter to the Attorney General of Florida, written in 1983, Ford appeared to assume authority for ending the "crisis," claiming to have fired a number of prison officials. He began to refer to himself as "Pope John Paul, III," and reported having appointed nine new justices to the Florida Supreme Court. *Id.*, at 59.

Counsel for Ford asked a psychiatrist who had examined Ford earlier, Dr. Jamal Amin, to continue seeing him and to recommend appropriate treatment. On the basis of roughly 14 months of evaluation, taped conversations between Ford and his attorneys, letters written by Ford, interviews with Ford's acquaintances, and various medical records, Dr. Amin concluded in 1983 that Ford suffered from "a severe, uncontrollable, mental disease which closely resembles 'Paranoid

Schizophrenia With Suicide Potential'"—a "major mental disorder . . . severe enough to substantially affect Mr. Ford's present ability to assist in the defense of his life." *Id.*, at 91.

Ford subsequently refused to see Dr. Amin again, believing him to have joined the conspiracy against him, and Ford's counsel sought assistance from Dr. Harold Kaufman, who interviewed Ford in November 1983. Ford told Dr. Kaufman that "I know there is some sort of death penalty, but I'm free to go whenever I want because it would be illegal and the executioner would be executed." *Id.*, at 65. When asked if he would be executed, Ford replied: "I can't be executed because of the landmark case. I won. Ford v. State will prevent executions all over." *Id.*, at 66. These statements appeared amidst long streams of seemingly unrelated thoughts in rapid succession. Dr. Kaufman concluded that Ford had no understanding of why he was being executed, made no connection between the homicide of which he had been convicted and the death penalty, and indeed sincerely believed that he would not be executed because he owned the prisons and could control the Governor through mind waves. *Id.*, at 67. Dr. Kaufman found that there was "no reasonable possibility that Mr. Ford was dissembling, malingering or otherwise putting on a performance . . . ." *Id.*, at 65. The following month, in an interview with his attorneys, Ford regressed further into nearly complete incomprehensibility, speaking only in a code characterized by intermittent use of the word "one," making statements such as "Hands one, face one. Mafia one. God one, father one, Pope one. Pope one. Leader one." *Id.*, at 72.

Counsel for Ford invoked the procedures of Florida law governing the determination of competency of a condemned inmate, Fla. Stat. § 922.07 (1985). Following the procedures set forth in the statute, the Governor of Florida appointed a panel of three psychiatrists to evaluate whether, under § 922.07(2), Ford had "the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him." At a single meeting, the three psychiatrists together interviewed Ford for approximately 30 minutes. Each doctor then filed a separate two- or three-page report with the Governor, to whom the statute delegates the final decision. One doctor concluded that Ford suffered from "psychosis with paranoia" but had "enough cognitive functioning to understand the nature and the effects of the death penalty, and why it is to be imposed on him." App. 103. Another found that, although Ford was "psychotic," he did "know fully what can happen to him." *Id.*, at 105–106. The third concluded that Ford had a "severe adaptational disorder," but did "comprehend his total situation including being sentenced to death, and all of the implications of that penalty." *Id.*, at 99–100. He believed that Ford's disorder, "although severe, seem[ed] contrived and recently learned." *Id.*, at 100. Thus, the interview produced three different diagnoses, but accord on the question of sanity as defined by state law.

The Governor's decision was announced on April 30, 1984, when, without explanation or statement, he signed a death warrant for Ford's execution. Ford's attorneys unsuccessfully sought a hearing in state court to determine anew Ford's competency to suffer execution. *Ford* v. *Wainwright*, 451 So. 2d 471, 475 (Fla. 1984). Counsel then filed a petition for habeas corpus in the United States District Court for the Southern District of Florida, seeking an evidentiary hearing on the question of Ford's sanity, proffering the conflicting findings of the Governor-appointed commission and subsequent challenges to their methods by other psychiatrists. The District Court denied the petition without a hearing. The Court of Appeals granted a certificate of probable cause and stayed Ford's execution, *Ford* v. *Strickland*, 734 F. 2d 538 (CA11 1984), and we rejected the State's effort to vacate the stay of execution. *Wainwright* v. *Ford*, 467 U. S. 1220 (1984). The Court of Appeals then addressed the merits of Ford's claim and a divided panel affirmed the District Court's denial of the writ. 752 F. 2d 526 (CA11 1985). This Court granted Ford's petition for certiorari in order to resolve the important issue whether the Eighth Amendment prohibits the execution of the insane and, if so, whether the District Court should have held a hearing on petitioner's claim. 474 U. S. 1019 (1985).

II

Since this Court last had occasion to consider the infliction of the death penalty upon the insane, our interpretations of the Due Process Clause and the Eighth Amendment have evolved substantially. In *Solesbee* v. *Balkcom*, 339 U. S. 9 (1950), a condemned prisoner claimed a due process right to a judicial determination of his sanity, yet the Court did not consider the possible existence of a right under the Eighth Amendment, which had not yet been applied to the States. The sole question the Court addressed was whether Georgia's procedure for ascertaining sanity adequately effectuated that State's own policy of sparing the insane from execution. See also *Caritativo* v. *California*, 357 U. S. 549 (1958); *United States ex rel. Smith* v. *Baldi*, 344 U. S. 561 (1953); *Phyle* v. *Duffy*, 334 U. S. 431 (1948); *Nobles* v. *Georgia*, 168 U. S. 398 (1897). Now that the Eighth Amendment has been recognized to affect significantly both the procedural and the substantive aspects of the death penalty, the question of executing the insane takes on a wholly different complexion. The adequacy of the procedures chosen by a State to determine sanity, therefore, will depend upon an issue that this Court has never addressed: whether the Constitution places a substantive restriction on the State's power to take the life of an insane prisoner.

There is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted. See *Solem* v. *Helm*, 463 U. S. 277, 285–286 (1983); *id.*, at 312–313 (BURGER, C. J., joined by

WHITE, REHNQUIST, and O'CONNOR, JJ., dissenting); *Furman* v. *Georgia*, 408 U. S. 238, 264 (1972) (BRENNAN, J., concurring); *McGautha* v. *California*, 402 U. S. 183, 226 (1971) (Black, J., concurring). "Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection . . . ." *Solem* v. *Helm*, *supra*, at 286.

Moreover, the Eighth Amendment's proscriptions are not limited to those practices condemned by the common law in 1789. See *Gregg* v. *Georgia*, 428 U. S. 153, 171 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). Not bound by the sparing humanitarian concessions of our forebears, the Amendment also recognizes the "evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion). In addition to considering the barbarous methods generally outlawed in the 18th century, therefore, this Court takes into account objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the Amendment protects. See *Coker* v. *Georgia*, 433 U. S. 584, 597 (1977) (plurality opinion).

A

We begin, then, with the common law. The bar against executing a prisoner who has lost his sanity bears impressive historical credentials; the practice consistently has been branded "savage and inhuman." 4 W. Blackstone, Commentaries *24–*25 (hereinafter Blackstone). Blackstone explained:

> "[I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for

> it: because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution." *Ibid.* (footnotes omitted).

Sir Edward Coke had earlier expressed the same view of the common law of England: "[B]y intendment of Law the execution of the offender is for example, . . . but so it is not when a mad man is executed, but should be a miserable spectacle, both against Law, and of extream inhumanity and cruelty, and can be no example to others." 3 E. Coke, Institutes 6 (6th ed. 1680) (hereinafter Coke). Other recorders of the common law concurred. See 1 M. Hale, Pleas of the Crown 35 (1736) (hereinafter Hale); 1 W. Hawkins, Pleas of the Crown 2 (7th ed. 1795) (hereinafter Hawkins); Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 How. St. Tr. 474, 477 (1685) (hereinafter Hawles).

As is often true of common-law principles, see O. Holmes, The Common Law 5 (1881), the reasons for the rule are less sure and less uniform than the rule itself. One explanation is that the execution of an insane person simply offends humanity, Coke 6; another, that it provides no example to others and thus contributes nothing to whatever deterrence value is intended to be served by capital punishment. *Ibid.* Other commentators postulate religious underpinnings: that it is uncharitable to dispatch an offender "into another world, when he is not of a capacity to fit himself for it," Hawles 477. It is also said that execution serves no purpose in these cases because madness is its own punishment: *furiosus* *solo furore punitur.* Blackstone *395. More recent commentators opine that the community's quest for "retribution"—the need to offset a criminal act by a punishment of equivalent "moral quality"—is not served by execution of an insane person, which has a "lesser value" than that of the crime for which he is to be punished. Hazard & Louisell, Death, the State, and the Insane: Stay of Execution, 9 UCLA L. Rev. 381, 387 (1962). Unanimity of rationale, therefore, we do not find. "But whatever the reason of the law is, it is plain the law is so." Hawles 477. We know of virtually no authority condoning the execution of the insane at English common law.[1]

Further indications suggest that this solid proscription was carried to America, where it was early observed that "the judge is bound" to stay the execution upon insanity of the prisoner. 1 J. Chitty, A Practical Treatise on the Criminal Law *761; see 1 F. Wharton, A Treatise on Criminal Law § 59 (8th ed. 1880).

B

This ancestral legacy has not outlived its time. Today, no State in the Union permits the execution of the insane.[2] It is clear that the ancient and humane limitation upon the State's ability to execute its sentences has as firm a hold upon the jurisprudence of today as it had centuries ago in England. The various reasons put forth in support of the common-law restriction have no less logical, moral, and practical force than they did when first voiced. For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life. See Note, The Eighth Amendment and the Execution of the Presently Incompetent, 32 Stan. L. Rev. 765, 777, n. 58 (1980). Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment

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[1] At one point, Henry VIII enacted a law requiring that if a man convicted of treason fell mad, he should nevertheless be executed. 33 Hen. VIII, ch. 20. This law was uniformly condemned. See Blackstone *25; 1 Hale 35; 1 Hawkins 2. The "cruel and inhumane Law lived not long, but was repealed, for in that point also it was against the Common Law . . . ." Coke 6.

[2] Of the 50 States, 41 have a death penalty or statutes governing execution procedures. Of those, 26 have statutes explicitly requiring the suspension of the execution of a prisoner who meets the legal test for incompetence. See Ala. Code § 15–16–23 (1982); Ariz. Rev. Stat. Ann. § 13–4023 (1978); Ark. Stat. Ann. § 43–2622 (1977); Cal. Penal Code Ann. § 3703 (West 1982); Colo. Rev. Stat. § 16–8–112(2) (Supp. 1985); Conn. Gen. Stat. § 54–101 (1985); Fla. Stat. § 922.07 (1985 and Supp. 1986); Ga. Code Ann. § 17–10–62 (1982); Ill. Rev. Stat., ch. 38, ¶ 1005–2–3 (1982); Kan. Stat. Ann. § 22–4006(3) (1981); Ky. Rev. Stat § 431.240(2) (1985); Md. Ann. Code, Art. 27, § 75(c) (Supp. 1985); Miss. Code Ann. § 99–19–57(2) (Supp. 1985);

Mo. Rev. Stat § 552.060 (1978); Mont. Code Ann. § 46–14–221 (1984); Neb. Rev. Stat. § 29–2537 (1979); Nev. Rev. Stat. § 176.445 (1985); N. J. Stat. Ann. § 30:4–82 (West 1981); N. M. Stat. Ann. § 31–14–6 (1984); N. Y. Correc. Law § 656 (McKinney Supp. 1986); N. C. Gen. Stat. § 15A–1001 (1983); Ohio Rev. Code Ann. § 2949.29 (1982); Okla. Stat., Tit. 22, § 1008 (1986); S. D. Codified Laws § 23A–27A–24 (1979); Utah Code Ann. § 77–19–13 (1982); Wyo. Stat. § 7–13–901 (Supp. 1986). Others have adopted the common-law rule by judicial decision. See *State* v. *Allen*, 204 La. 513, 515, 15 So. 2d 870, 871 (1943); *Commonwealth* v. *Moon*, 383 Pa. 18, 22–23, 117 A. 2d 96, 99 (1955); *Jordan* v. *State*, 124 Tenn. 81, 89–90 135 S. W. 327, 329 (1911); *State* v. *Davis*, 6 Wash. 2d 696, 717, 108 P. 2d 641, 651 (1940). Still others have more discretionary statutory procedures providing for the suspension of sentence and transfer to mental facilities for convicted prisoners who have developed mental illness. See Del. Code Ann., Tit. 11, § 406 (1979); Ind. Code § 11–10–4–2 (1982); Mass. Gen. Laws, ch. 279, § 62 (1984); R. I. Gen. Laws § 40.1–5.3–7 (1984); S. C. Code § 44–23–220 (1985); Tex. Code Crim. Proc. Ann., Art. 46.01 (1979); Va. Code § 19.2–177 (1983). The remaining four States having a death penalty have no specific procedure governing insanity, but have not repudiated the common-law rule.

prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.

III

The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane. Petitioner's allegation of insanity in his habeas corpus petition, if proved, therefore, would bar his execution. The question before us is whether the District Court was under an obligation to hold an evidentiary hearing on the question of Ford's sanity. In answering that question, we bear in mind that, while the underlying social values encompassed by the Eighth Amendment are rooted in historical traditions, the manner in which our judicial system protects those values is purely a matter of contemporary law. Once a substantive right or restriction is recognized in the Constitution, therefore, its enforcement is in no way confined to the rudimentary process deemed adequate in ages past.

A

In a habeas corpus proceeding, "a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts." *Townsend* v. *Sain*, 372 U. S. 293, 312–313 (1963). The habeas corpus statute, following this Court's decision in *Townsend*, provides that, in general, "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . , shall be presumed to be correct," and an evidentiary hearing not required. 28 U. S. C. § 2254(d). In this case, it is clear that no state court has issued any determination to which that presumption of correctness could be said to attach; indeed, no court played any role in the rejection of petitioner's claim of insanity. Thus, quite simply, *Townsend* and §2254 require the District Court to grant a hearing *de novo* on that question.

But our examination does not stop there. For even when a state court has rendered judgment, a federal court is obliged to hold an evidentiary hearing on habeas corpus if, among other factors, "the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing," §2254(d)(2); or "the material facts were not adequately developed at the State court hearing," §2254(d)(3); or "the applicant did not receive a full, fair, and adequate hearing in the State court proceeding." §2254(d)(6). If federal factfinding is to be avoided, then, in addition to providing a court judgment on the constitutional question, the State must also ensure that its procedures are adequate for the purpose of finding the facts.

B

The adequacy of a state-court procedure under *Townsend* is largely a function of the circumstances and the interests at stake. In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. See, *e. g., Spaziano* v. *Florida*, 468 U. S. 447, 456 (1984). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different. See *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.).

Although the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether; if the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being. Thus, the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding. Indeed, a particularly acute need for guarding against error inheres in a determination that "in the present state of the mental sciences is at best a hazardous guess however conscienticus." *Solesbee* v. *Balkcom*, 339 U. S., at 23 (Frankfurter, J., dissenting). That need is greater still because the ultimate decision will turn on the finding of a single fact, not on a range of equitable considerations. Cf. *Woodson* v. *North Carolina*, *supra*, at 304. In light of these concerns, the procedures employed in petitioner's case do not fare well.

C

Florida law directs the Governor, when informed that a person under sentence of death may be insane, to stay the execution and appoint a commission of three psychiatrists to examine the prisoner. Fla. Stat. § 922.07 (1985 and Supp. 1986). "The examination of the convicted person shall take place with all three psychiatrists present at the same time." *Ibid.* After receiving the report of the commission, the Governor must determine whether "the convicted person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed on him." *Ibid.* If the Governor finds that the prisoner has that capacity, then a death warrant is issued; if not, then the prisoner is committed to a mental health facility. The procedure is conducted wholly within the executive branch, *ex parte*, and provides the exclusive means for determining sanity. *Ford* v. *Wainwright*, 451 So. 2d, at 475.

Petitioner received the statutory process. The Governor selected three psychiatrists, who together interviewed Ford for a total of 30 minutes, in the presence of eight other people, including Ford's counsel, the State's attorneys, and correctional officials. The Governor's order specifically directed that the attorneys should not participate in the examination in any adversarial manner. This order was consistent with the present Governor's "publicly announced policy of excluding all advocacy on the part of the condemned from the process of determining whether a person under a sentence of death is insane." *Goode* v. *Wainwright*, 448 So. 2d 999, 1001 (Fla. 1984).

After submission of the reports of the three examining psychiatrists, reaching conflicting diagnoses but agreeing on the ultimate issue of competency, Ford's counsel attempted to submit to the Governor some other written materials, including the reports of the two other psychiatrists who had examined Ford at greater length, one of whom had concluded that the prisoner was not competent to suffer execution. The Governor's office refused to inform counsel whether the submission would be considered. The Governor subsequently issued his decision in the form of a death warrant. That this most cursory form of procedural review fails to achieve even the minimal degree of reliability required for the protection of any constitutional interest, and thus falls short of adequacy under *Townsend*, is self-evident.

IV

A

The first deficiency in Florida's procedure lies in its failure to include the prisoner in the truth-seeking process. Notwithstanding this Court's longstanding pronouncement that "[t]he fundamental requisite of due process of law is the opportunity to be heard," *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914), state practice does not permit any material relevant to the ultimate decision to be submitted on behalf of the prisoner facing execution. In all other proceedings leading to the execution of an accused, we have said that the factfinder must "have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek* v. *Texas*, 428 U. S. 262, 276 (1976) (plurality opinion). And we have forbidden States to limit the capital defendant's submission of relevant evidence in mitigation of the sentence. *Skipper* v. *South Carolina*, 476 U. S. 1, 8

(1986); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (joint opinion). It would be odd were we now to abandon our insistence upon unfettered presentation of relevant information, before the final fact antecedent to execution has been found.

Rather, consistent with the heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life, we believe that any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate. "[T]he minimum assurance that the life-and-death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected." *Solesbee* v. *Balkcom*, *supra*, at 23 (Frankfurter, J., dissenting).

We recently had occasion to underscore the value to be derived from a factfinder's consideration of differing psychiatric opinions when resolving contested issues of mental state. In *Ake* v. *Oklahoma*, 470 U. S. 68 (1985), we recognized that, because "psychiatrists disagree widely and frequently on what constitutes mental illness [and] on the appropriate diagnosis to be attached to given behavior and symptoms," the factfinder must resolve differences in opinion within the psychiatric profession "on the basis of the evidence offered by each party" when a defendant's sanity is at issue in a criminal trial. *Id.*, at 81. The same holds true after conviction; without any adversarial assistance from the prisoner's representative—especially when the psychiatric opinion he proffers is based on much more extensive evaluation than that of the state-appointed commission—the factfinder loses the substantial benefit of potentially probative information. The result is a much greater likelihood of an erroneous decision.

B

A related flaw in the Florida procedure is the denial of any
pportunity to challenge or impeach the state-appointed psy-
hiatrists' opinions. "[C]ross-examination . . . is beyond any
oubt the greatest legal engine ever invented for the discov-
y of truth." 5 J. Wigmore, Evidence § 1367 (J. Chadbourn
ev. 1974). Cross-examination of the psychiatrists, or per-
aps a less formal equivalent, would contribute markedly to
e process of seeking truth in sanity disputes by bringing to
ght the bases for each expert's beliefs, the precise factors
nderlying those beliefs, any history of error or caprice of the
xaminer, any personal bias with respect to the issue of capi-
l punishment, the expert's degree of certainty about his or
er own conclusions, and the precise meaning of ambiguous
ords used in the report. Without some questioning of the
xperts concerning their technical conclusions, a factfinder
mply cannot be expected to evaluate the various opinions,
rticularly when they are themselves inconsistent. See
arefoot v. *Estelle*, 463 U. S. 880, 899 (1983). The failure of
e Florida procedure to afford the prisoner's representative
y opportunity to clarify or challenge the state experts'
inions or methods creates a significant possibility that the
timate decision made in reliance on those experts will be
storted.[3]

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[3] The adequacy of the factfinding procedures is further called into ques-
n by the cursory nature of the underlying psychiatric examination itself.
hile this Court does not purport to set substantive guidelines for the
velopment of expert psychiatric opinion, cf. *Barefoot* v. *Estelle*, 463
S. 880, 903 (1983), we can say that the goal of reliability is unlikely to be
rved by a single group interview, with no provision for the exercise of
e psychiatrists' professional judgment regarding the possible need for
fferent or more comprehensive evaluative techniques. The inconsis-
ncy and vagueness of the conclusions reached by the three examin-
g psychiatrists in this case attest to the dubious value of such an
amination.

C

Perhaps the most striking defect in the procedures of Fla. Stat. § 922.07 (1985 and Supp. 1986), as noted earlier, is the State's placement of the decision wholly within the executive branch. Under this procedure, the person who appoints the experts and ultimately decides whether the State will be able to carry out the sentence that it has long sought is the Governor, whose subordinates have been responsible for initiating every stage of the prosecution of the condemned from arrest through sentencing. The commander of the State's corps of prosecutors cannot be said to have the neutrality that is necessary for reliability in the factfinding proceeding.

Historically, delay of execution on account of insanity was not a matter of executive clemency *(ex mandato regis)* or judicial discretion *(ex arbitrio judicis);* rather, it was required by law *(ex necessitate legis)*. 1 N. Walker, Crime and Insanity in England 196 (1968). Thus, history affords no better basis than does logic for placing the final determination of a fact, critical to the trigger of a constitutional limitation upon the State's power, in the hands of the State's own chief executive. In no other circumstance of which we are aware is the vindication of a constitutional right entrusted to the unreviewable discretion of an administrative tribunal.

V

A

Having identified various failings of the Florida scheme, we must conclude that the State's procedures for determining sanity are inadequate to preclude federal redetermination of the constitutional issue. We do not here suggest that only a full trial on the issue of sanity will suffice to protect the federal interests; we leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.[4] It may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity. Cf. *Pate* v. *Robinson*, 383 U. S. 375, 387 (1966) (hearing on competency to stand trial required if "sufficient doubt" of competency exists). Other legitimate pragmatic considerations may also supply the boundaries of the procedural safeguards that feasibly can be provided.

Yet the lodestar of any effort to devise a procedure must be the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination. The stakes are high, and the "evidence" will always be imprecise. It is all the more important that the adversary presentation of relevant information be as unrestricted as possible. Also essential is that the manner of selecting and using the experts responsible for producing that "evidence" be conducive to the formation of neutral, sound, and professional judgments as to the prisoner's ability to comprehend the nature of the penalty. Fidelity to these principles is the solemn obligation of a civilized society.

B

Today we have explicitly recognized in our law a principle that has long resided there. It is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications. In light of the clear need for trustworthiness in any factual finding that will prevent or permit the carrying out of an execution, we hold that Fla. Stat. § 922.07 (1985 and Supp. 1986) provides inadequate assurances of accuracy to satisfy the requirements of *Townsend* v. *Sain*, 372 U. S. 293 (1963). Having been denied a factfinding procedure "adequate to afford a full and fair hearing" on the critical issue, 28 U. S. C. § 2254(d)(2), petitioner is entitled to an evidentiary hearing in the District Court, *de novo*, on the question of his competence to be executed. *Townsend* v. *Sain*, *supra*, at 312.

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[4] Instructive analogies may be found in the State's own procedures for determining whether a defendant is competent to stand trial, Fla. Stat. §§ 916.11–916.12 (1985 and Supp. 1986), or in the comprehensive safeguards that Florida ensures to those subjected to involuntary commitment proceedings, Fla. Stat. § 394.467 (1986). The parties' interests are of course somewhat different in those contexts; nevertheless, all such inquests share the common goal of reaching a fair assessment of the subject's mental state.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, concurring in part and concurring in the judgment.

I join Parts I and II of the Court's opinion. As JUSTICE MARSHALL ably demonstrates, execution of the insane was barred at common law precisely because it was considered cruel and unusual. In *Solem* v. *Helm*, 463 U. S. 277 (1983), we explained that while the Framers "may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection." *Id.*, at 286. It follows that the practice of executing the insane is barred by our own Constitution.

That conclusion leaves two issues for our determination: (i) the meaning of insanity in this context, and (ii) the procedures States must follow in order to avoid the necessity of *de novo* review in federal courts under 28 U. S. C. § 2254(d). The Court's opinion does not address the first of these issues, and as to the second, my views differ substantially from JUSTICE MARSHALL's. I therefore write separately.

I

The Court holds today that the Eighth Amendment bars execution of a category of defendants defined by their mental state. The bounds of that category are necessarily governed by federal constitutional law. I therefore turn to the same sources that give rise to the substantive right to determine its precise definition: chiefly, our common-law heritage and the modern practices of the States, which are indicative of our "evolving standards of decency." *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion). See *Solem* v. *Helm*, *supra*, at 284–286; *Gregg* v. *Georgia*, 428 U. S. 153, 175–176 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.).

A

As the Court recognizes, *ante*, at 407–408, the ancient prohibition on execution of the insane rested on differing theories. Those theories do not provide a common answer when it comes to defining the mental awareness required by the Eighth Amendment as a prerequisite to a defendant's execution. On the one hand, some authorities contended that the prohibition against executing the insane was justified as a way of preserving the defendant's ability to make arguments on his own behalf. See 1 M. Hale, Pleas of the Crown 35 (1736) ("if after judgment he become of *non sane memory*, his execution shall be spared; for were he of sound memory he might allege somewhat in stay of judgment or execution"); accord 4 W. Blackstone, Commentaries *388–*389. Other authorities suggest, however, that the prohibition derives from more straightforward humanitarian concerns. Coke expressed the view that execution was intended to be an "example" to the living, but that the execution of "a mad man" was such "a miserable spectacle . . . of extream inhumanity and cruelty" that it "can be no example to others." 3 E. Coke, Institutes 6 (1794). Hawles added that it is "against christian charity to send a great offender quick . . . into another world, when he is not of a capacity to fit himself for it."

Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 How. St. Tr. 474, 477 (1685).

The first of these justifications has slight merit today. Modern practice provides far more extensive review of convictions and sentences than did the common law, including not only direct appeal but ordinarily both state and federal collateral review.[1] Throughout this process, the defendant has access to counsel, by constitutional right at trial, and by employment or appointment at other stages of the process whenever the defendant raises substantial claims. Nor does the defendant merely have the right to counsel's assistance; he also has the right to the *effective* assistance of counsel at trial and on appeal. *Evitts* v. *Lucey*, 469 U. S. 387 (1985); *Strickland* v. *Washington*, 466 U. S. 668 (1984). See *Kimmelman* v. *Morrison*, *ante*, at 392–393 (POWELL, J., concurring in judgment). These guarantees are far broader than those enjoyed by criminal defendants at common law. It is thus unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free.

In addition, in cases tried at common law execution often followed fairly quickly after trial, so that incompetence at the time of execution was linked as a practical matter with incompetence at the trial itself. Our decisions already recognize, however, that a defendant must be competent to stand trial, and thus the notion that a defendant must be able to assist in his defense is largely provided for. See *Drope* v. *Missouri*, 420 U. S. 162 (1975).[2]

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[1] Petitioner offers a good example. Petitioner was convicted of first-degree murder in 1974. On direct appeal, his conviction and sentence were affirmed, *Ford* v. *State*, 374 So. 2d 496 (Fla. 1979), and this Court denied certiorari. 445 U. S. 972 (1980). Petitioner then joined 122 other death row inmates in seeking extraordinary relief from the Florida Supreme Court, based on that court's allegedly improper procedure for review of capital cases. This petition for relief was denied, *Brown* v. *Wainwright*, 392 So. 2d 1327 (Fla. 1981), and this Court again denied certiorari. 454 U. S. 1000 (1981). Petitioner filed a motion for postconviction relief in state court, and relief was again denied. *Ford* v. *State*, 407 So. 2d 907 (Fla. 1981). Following these unsuccessful attempts to obtain relief from his conviction or execution in state court, petitioner filed a petition for habeas corpus in federal court. Relief was again denied, *Ford* v. *Strickland*, 696 F. 2d 804 (CA11) (en banc), cert. denied, 464 U. S. 865 (1983). Only after all of these challenges had been resolved against him did petitioner challenge his impending execution on the ground of insanity.

B

The more general concern of the common law—that executions of the insane are simply cruel—retains its vitality. It is as true today as when Coke lived that most men and women value the opportunity to prepare, mentally and spiritually, for their death. Moreover, today as at common law, one of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence and purpose. Thus, it remains true that executions of the insane both impose a uniquely cruel penalty and are inconsistent with one of the chief purposes of executions generally. For precisely these reasons, Florida requires the Governor to stay executions of those who "d[o] not have the mental capacity to understand the nature of the death penalty and why it was imposed" on them. Fla. Stat. § 922.07 (1985 and Supp. 1986). See also Ill. Rev. Stat., ch. 38, ¶ 1005-2-3(a) (1985) ("A person is unfit to be executed if because of a mental condition he is unable to understand the nature and purpose of such sentence"); *State* v. *Pastet*, 169 Conn. 13, 28, 363 A. 2d 41, 49 (question is "whether the defendant was able to understand the nature of the sentencing proceedings, i. e., why he was being punished and the nature of his punishment"), cert. denied, 423 U. S. 937 (1975). A number of

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[2] Moreover, a standard that focused on the defendant's ability to assist in his defense would give too little weight to the State's interest in finality, since it implies a constitutional right to raise new challenges to one's criminal conviction until sentence has run its course. Such an implication is false: we have made clear that States have a strong and legitimate interest in avoiding repetitive collateral review through procedural bars. See *Kuhlmann* v. *Wilson*, *post*, at 452–454 (plurality opinion).

States have more rigorous standards,[3] but none disputes the need to require that those who are executed know the fact of their impending execution and the reason for it.

Such a standard appropriately defines the kind of mental deficiency that should trigger the Eighth Amendment prohibition. If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.

Petitioner's claim of insanity plainly fits within this standard. According to petitioner's proffered psychiatric examination, petitioner does not know that he is to be executed, but rather believes that the death penalty has been invalidated. App. 65-67. If this assessment is correct, petitioner cannot connect his execution to the crime for which he was convicted. Thus, the question is whether petitioner's evidence entitles him to a hearing in Federal District Court on his claim.

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[3] A number of States have remained faithful to Blackstone's view that a defendant cannot be executed unless he is able to assist in his own defense. *E. g.*, Miss. Code Ann. § 99-19-57(2)(b) (Supp. 1985); Mo. Rev. Stat. § 552.060(1) (1978); Utah Code Ann. § 77-15-2 (1982). The majority of States appear not to have addressed the issue in their statutes. Modern case authority on this question is sparse, and while some older cases favor the Blackstone view, see 24 C. J. S., Criminal Law § 1619 (1961), those cases largely antedate the recent expansion of both the right to counsel and the availability of federal and state collateral review. Moreover, other cases suggest that the prevailing test is "whether the condemned man was aware of his conviction and the nature of his impending fate"—essentially the same test stated by Florida's statute. Note, Insanity of the Condemned, 88 Yale L. J. 533, 540 (1979); see Hazard & Louisell, Death, the State, and the Insane: Stay of Execution, 9 UCLA L. Rev. 381, 394, and n. 44 (1962) (discussing cases). Under these circumstances, I find no sound basis for constitutionalizing the broader definition of insanity, with its requirement that the defendant be able to assist in his own defense. States are obviously free to adopt a more expansive view of sanity in this context than the one the Eighth Amendment imposes as a constitutional minimum.

II

Petitioner concedes that the Governor of Florida has determined that he is not insane under the standard prescribed by Florida's statute, which is the same as the standard just described. Petitioner further concedes that there is expert evidence that supports the Governor's finding. Thus, if that finding is entitled to a presumption of correctness under 28 U. S. C. § 2254(d), there is no ground for holding a hearing on petitioner's federal habeas corpus petition.

I agree with JUSTICE MARSHALL that the Governor's finding is not entitled to a presumption of correctness under § 2254(d). I reach this conclusion for two independent reasons. First, § 2254(d) requires deference to the factual findings of "a State court of competent jurisdiction." The term "State court" may have a certain amount of flexibility,[4] but no amount of stretching can extend it to include the Governor. The essence of a "court" is independence from the prosecutorial arm of government and, as JUSTICE MARSHALL correctly notes, the Governor is "[t]he commander of the State's corps of prosecutors." *Ante*, at 416. Unless the relevant language is to be read out of the statute, I see no basis for affording any deference to the Governor's determination.

Second, the presumption of correctness does not attach to the Governor's implicit finding of sanity because the State did not give petitioner's claim "a full and fair hearing," 28 U. S. C. § 2254(d)(2). This statutory phrase apparently was drawn from the Court's opinion in *Townsend* v. *Sain*, 372 U. S. 293, 313 (1963). There, the Court concluded that where the state court's "fact-finding procedure . . . was not adequate for reaching reasonably correct results," or where the process "appear[ed] to be seriously inadequate for the ascertainment of the truth," no presumption of correctness would attach to the state court's findings when those findings were challenged on federal habeas corpus. *Id.*, at 316.

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[4] Although we need not decide the issue in this case, the term "State court" may well encompass an independent panel of psychiatric experts who might both examine the defendant and determine his legal sanity.

At least in the context of competency determinations prior to execution, this standard is no different from the protection afforded by procedural due process. It is clear that an insane defendant's Eighth Amendment interest in forestalling his execution unless or until he recovers his sanity cannot be deprived without a "fair hearing." Indeed, fundamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause. See *Lassiter* v. *Department of Social Services of Durham County*, 452 U. S. 18, 24–25 (1981). Thus, the question in this case is whether Florida's procedures for determining petitioner's sanity comport with the requirements of due process.

Together with JUSTICE MARSHALL and JUSTICE O'CONNOR, I would hold that they do not. As JUSTICE O'CONNOR states, "[i]f there is one 'fundamental requisite' of due process, it is that an individual is entitled to an 'opportunity to be heard.'" *Post*, at 430 (quoting *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914)). In this case, petitioner was deprived of that opportunity. The Florida statute does not require the Governor to consider materials submitted by the prisoner, and the present Governor has a "publicly announced policy of excluding" such materials from his consideration. *Goode* v. *Wainwright*, 448 So. 2d 999, 1001 (Fla. 1984). Thus, the determination of petitioner's sanity appears to have been made *solely* on the basis of the examinations performed by state-appointed psychiatrists. Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations. It does not, therefore, comport with due process. It follows that the State's procedure was not "fair," and that the District Court on remand must consider the question of petitioner's competency to be executed.

III

While the procedures followed by Florida in this case do not comport with basic fairness, I would not require the kind of full-scale "sanity trial" that JUSTICE MARSHALL appears to find necessary. See *ante*, at 413–416, 418. Due process is a flexible concept, requiring only "such procedural protections as the particular situation demands." *Mathews* v. *Eldridge*, 424 U. S. 319, 334 (1976); *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). See also *post*, at 429 (O'CONNOR, J., concurring in result in part and dissenting in part). In this instance, a number of considerations support the conclusion that the requirements of due process are not as elaborate as JUSTICE MARSHALL suggests.

First, the Eighth Amendment claim at issue can arise only after the prisoner has been validly convicted of a capital crime and sentenced to death. Thus, in this case the State has a substantial and legitimate interest in taking petitioner's life as punishment for his crime. That interest is not called into question by petitioner's claim. Rather, the only question raised is not *whether*, but *when*, his execution may take place.[5] This question is important, but it is not comparable to the antecedent question whether petitioner should be executed at all. It follows that this Court's decisions imposing heightened procedural requirements on capital trials and sentencing proceedings—*e. g.*, *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion); *Turner* v. *Murray*, 476 U. S. 28 (1986)—do not apply in this context.

Second, petitioner does not make his claim of insanity against a neutral background. On the contrary, in order to have been convicted and sentenced, petitioner must have been judged competent to stand trial, or his competency must have been sufficiently clear as not to raise a serious question for the trial court. The State therefore may properly presume that petitioner remains sane at the time sentence is to be carried out,[6] and may require a substantial threshold showing of insanity merely to trigger the hearing process. Cf. *Ake* v. *Oklahoma*, 470 U. S. 68, 82–83 (1985).

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[5] It is of course true that some defendants may lose their mental faculties and never regain them, and thus avoid execution altogether. My point is only that if petitioner is cured of his disease, the State is free to execute him.

Finally, the sanity issue in this type of case does not resemble the basic issues at trial or sentencing. Unlike issues of historical fact, the question of petitioner's sanity calls for a basically subjective judgment. See *Addington* v. *Texas*, 441 U. S. 418, 429–430 (1979); cf. *Barefoot* v. *Estelle*, 463 U. S. 880, 898–901 (1983). And unlike the determination of whether the death penalty is appropriate in a particular case, the competency determination depends substantially on expert analysis in a discipline fraught with "subtleties and nuances." *Addington*, *supra*, at 430. This combination of factors means that ordinary adversarial procedures—complete with live testimony, cross-examination, and oral argument by counsel—are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity. Cf. *Parham* v. *J. R.*, 442 U. S. 584, 609 (1979) ("Common human experience and scholarly opinions suggest that the supposed protections of an adversary proceeding to determine the appropriateness of medical decisions for the commitment and treatment of mental and emotional illness may well be more illusory than real").

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[6] Cf. *Addington* v. *Texas*, 441 U. S. 418 (1979). In *Addington*, the Court held that States must require proof by clear and convincing evidence in order to involuntarily commit an individual to a mental hospital for treatment. In this context, it is the defendant and not the State who seeks to overcome the presumption that he is sane; moreover, he does so following a trial and sentencing at which his sanity was either conceded or determined by the court.

We need not determine the precise limits that due process imposes in this area. In general, however, my view is that a constitutionally acceptable procedure may be far less formal than a trial. The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination. Beyond these basic requirements, the States should have substantial leeway to determine what process best balances the various interests at stake. As long as basic fairness is observed, I would find due process satisfied, and would apply the presumption of correctness of § 2254(d) on federal habeas corpus.

IV

Because petitioner has raised a viable claim under the Eighth Amendment, and because that claim was not adjudicated fairly within the meaning of due process or of § 2254(d), petitioner is entitled to have his claim adjudicated by the District Court on federal habeas corpus. I therefore join the Court's judgment.

JUSTICE O'CONNOR, with whom JUSTICE WHITE joins, concurring in the result in part and dissenting in part.

I am in full agreement with JUSTICE REHNQUIST's conclusion that the Eighth Amendment does not create a substantive right not to be executed while insane. Accordingly, I do not join the Court's reasoning or opinion. Because, however, the conclusion is for me inescapable that Florida positive law has created a protected liberty interest in avoiding execution while incompetent, and because Florida does not provide even those minimal procedural protections required by due process in this area, I would vacate the judgment and remand to the Court of Appeals with directions that the case be returned to the Florida system so that a hearing can be held in a manner consistent with the requirements of the Due Process Clause. I cannot agree, however, that the federal courts should have any role whatever in the substantive determination of a defendant's competency to be executed.

As we explained in *Hewitt* v. *Helms*, 459 U. S. 460, 466 (1983), "[l]iberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the laws of the States." See also *Meachum* v. *Fano*, 427 U. S. 215, 223–227 (1976). With JUSTICE REHNQUIST, I agree that the Due Process Clause does not independently create a protected interest in avoiding the execution of a death sentence during incompetency. See also *Solesbee* v. *Balkcom*, 339 U. S. 9 (1950). The relevant provision of the Florida statute, however, provides that the Governor "*shall*" have the prisoner committed to a "Department of Corrections mental health treatment facility" if the prisoner "does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him." Fla. Stat. § 922.07(3) (1985 and Supp. 1986). Our cases leave no doubt that where a statute indicates with "language of an unmistakable mandatory character," that state conduct injurious to an individual will not occur "absent specified substantive predicates," the statute creates an expectation protected by the Due Process Clause. *Hewitt* v. *Helms*, *supra*, at 471–472. See also *Vitek* v. *Jones*, 445 U. S. 480, 488–491 (1980); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 10 (1979) (entitlement created where under state law "there is [a] set of facts which, if shown, mandate a decision favorable to the individual"). That test is easily met here. Nor is it relevant that the statute creating the interest also specifies the procedures to be followed when the State seeks to deprive the individual of that interest. As we reaffirmed last Term, "[t]he categories of substance and procedure are distinct." *Cleveland Board of Education* v. *Loudermill*, 470 U. S. 532, 541 (1985). Thus, regardless of the procedures the State deems adequate for determining the preconditions to adverse official action, federal law defines the kind of process a State must afford prior to depriving an individual of a protected liberty or property interest. *Id.*, at 541.

Although the state-created entitlement to avoid execution while insane unquestionably triggers the demands of the Due Process Clause, in my judgment those demands are minimal in this context. "It is axiomatic that due process 'is flexible and calls for such procedural protections as the particular situation [requires].'" *Greenholtz* v. *Nebraska Penal Inmates*, *supra*, at 12, quoting *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). And there are any number of reasons for concluding that this "particular situation" warrants substantial caution before reading the Due Process Clause to mandate anything like the full panoply of trial-type procedures. The prisoner's interest in avoiding an erroneous determination is, of course, very great. But I consider it self-evident that once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly. *Meachum* v. *Fano*, *supra*, at 224. Moreover, the potential for false claims and deliberate delay in this context is obviously enormous. *Nobles* v. *Georgia*, 168 U. S. 398, 405–406 (1897). This potential is exacerbated by a unique feature of the prisoner's protected interest in suspending the execution of a death sentence during incompetency. By definition, this interest can *never* be conclusively and finally determined: Regardless of the number of prior adjudications of the issue, until the very moment of execution the prisoner can claim that he has become insane sometime after the previous determination to the contrary. Hazard & Louisell, Death, the State and the Insane: Stay of Execution, 9 UCLA L. Rev. 381, 399–400 (1962). These difficulties, together with the fact that the issue arises only after conviction and sentencing, convince me that the Due Process Clause imposes few requirements on the States in this context.

Even given the broad latitude I would leave to the States in this area, however, I believe that one aspect of the Florida procedure for determining competency to be executed renders that procedure constitutionally deficient. If there is one "fundamental requisite" of due process, it is that an individual is entitled to an "opportunity to be heard." *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914). As currently implemented, the Florida procedure for determining competency violates this bedrock principle. By Executive Order, the present Governor has provided that "[c]ounsel for the inmate and the State Attorney may be present [at the competency hearing] but shall not participate in the examination in any adversarial manner." Exec. Order No. 83–137 (Dec. 9, 1983). See also *Goode* v. *Wainwright*, 448 So. 2d 999, 1001 (Fla. 1984) (describing the Governor's "publicly announced policy of excluding all advocacy on the part of the condemned from the process of determining whether a person under a sentence of death is insane"). Indeed, respondent does not dispute that the Governor's office has steadfastly refused to acknowledge whether it would even review the extensive psychiatric materials submitted by petitioner concerning his present mental state. While I would not invariably require oral advocacy or even cross-examination, due process at the very least requires that the decisionmaker consider the prisoner's written submissions.

I conclude therefore that Florida law has created a protected expectation that no execution will be carried out while the prisoner lacks the "mental capacity to understand the nature of the death penalty and why it was imposed on him." Fla. Stat. § 922.07(3) (1985). Because Florida's procedures are inadequate to satisfy even the minimal requirements of due process in this context, I would vacate the judgment below with instructions that the case be returned to Florida so that it might assess petitioner's competency in a manner that accords with the command of the Fourteenth Amendment. In my view, however, the only federal question presented in cases such as this is whether the State's positive law has created a liberty interest and whether its procedures are adequate to protect that interest from arbitrary deprivation. Once satisfied that the procedures were adequate, a federal court has no authority to second-guess a State's substantive competency determination.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The Court today holds that the Eighth Amendment prohibits a State from carrying out a lawfully imposed sentence of death upon a person who is currently insane. This holding is based almost entirely on two unremarkable observations. First, the Court states that it "know[s] of virtually no authority condoning the execution of the insane at English common law." *Ante*, at 408. Second, it notes that "[t]oday, no State in the Union permits the execution of the insane." *Ibid.* Armed with these facts, and shielded by the claim that it is simply "keep[ing] faith with our common-law heritage," *ante*, at 401, the Court proceeds to cast aside settled precedent and to significantly alter both the common-law and current practice of not executing the insane. It manages this feat by carefully ignoring the fact that the Florida scheme it finds unconstitutional, in which the Governor is assigned the ultimate responsibility of deciding whether a condemned prisoner is currently insane, is fully consistent with the "common-law heritage" and current practice on which the Court purports to rely.

The Court places great weight on the "impressive historical credentials" of the common-law bar against executing a prisoner who has lost his sanity. *Ante*, at 406–408. What it fails to mention, however, is the equally important and unchallenged fact that at common law it was the *executive* who passed upon the sanity of the condemned. See 1 N. Walker, Crime and Insanity in England 194–203 (1968). So when the Court today creates a constitutional right to a determination of sanity outside of the executive branch, it does so not in keeping with but at the expense of "our common-law heritage."

In *Solesbee* v. *Balkcom*, 339 U. S. 9 (1950), a condemned prisoner claimed that he had a constitutional right to a judicial determination of his sanity. There, as here, the State did not approve the execution of insane persons and vested in the Governor the responsibility for determining, with the aid of experts, the sanity *vel non* of persons sentenced to death. In rejecting the prisoner's claim, this Court stated:

> "Postponement of execution because of insanity bears a close affinity not to trial for a crime but rather to reprieves of sentences in general. The power to reprieve has usually sprung from the same source as the power to pardon. Power of executive clemency in this country undoubtedly derived from the practice as it had existed in England. Such power has traditionally rested in governors or the President, although some of that power is often delegated to agencies such as pardon or parole boards. Seldom, if ever, has this power of executive clemency been subjected to review by the courts." *Id.*, at 11–12.

Despite references to "evolving standards of decency," *ante*, at 406, and "the jurisprudence of today," *ante*, at 409, the Court points to no change since *Solesbee* in the States' approach to determining the sanity of a condemned prisoner. Current statutes quite often provide that initiation of inquiry into and/or final determination of postsentencing insanity is a matter for the executive or the prisoner's custodian.* The Court's profession of "faith to our common-law heritage" and

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*See Ariz. Rev. Stat. Ann. § 13–4021 (1978); Ark. Stat. Ann. § 43–2622 (1977); Cal. Penal Code Ann. § 3701 (West 1982); Conn. Gen. Stat. § 54–101 (1985); Ga. Code Ann. § 17–10–61 (1982); Kan. Stat. Ann. § 22–4006 (1981); Md. Ann. Code, Art. 27, § 75(c) (Supp. 1985); Mass. Gen Laws § 279:62 (1984); Miss. Code Ann. § 99–19–57 (Supp. 1985); Neb. Rev. Stat. § 29–2537 (1979); Nev. Rev. Stat. § 176.425 (1985); N. M. Stat. Ann. § 31–14–4 (1984); N. Y. Correc. Law § 655 (McKinney Supp. 1986); Ohio Rev. Code Ann. § 2949.28 (1982); Okla Stat., Tit. 22, § 1005 (1986); Utah Code Ann. § 77–19–13(1) (1982); Wyo. Stat. § 7–13–901 (Supp. 1986).

"evolving standards of decency" is thus at best a half-truth. It is Florida's scheme—which combines a prohibition against execution of the insane with executive-branch procedures for evaluating claims of insanity—that is more faithful to both traditional and modern practice. And no matter how long-standing and universal, laws providing that the State should not execute persons the executive finds insane are not themselves sufficient to create an Eighth Amendment right that sweeps away as inadequate the procedures for determining sanity crafted by those very laws.

Petitioner makes the alternative argument, not reached by the Court, that even if the Eighth Amendment does not prohibit execution of the insane, Florida's decision to bar such executions creates a right in condemned persons to trial-type procedures to determine sanity. Here, too, *Solesbee* is instructive:

> "Recently we have pointed out the necessary and inherent differences between trial procedures and post-conviction procedures such as sentencing. *Williams* v. *New York*, 337 U. S. 241. In that case we emphasized that certain trial procedure safeguards are not applicable to the process of sentencing. This principle applies even more forcefully to an effort to transplant every trial safeguard to a determination of sanity after conviction. As was pointed out in [*Nobles* v. *Georgia*, 168 U. S. 398 (1897)], to require judicial review every time a convicted defendant suggested insanity would make the possibility of carrying out a sentence depend upon 'fecundity in making suggestion after suggestion of insanity.' *Nobles* v. *Georgia*, *supra*, at 405–406. See also *Phyle* v. *Duffy*, [334 U. S. 431 (1948)]. To protect itself society must have power to try, convict, and execute sentences. Our legal system demands that this governmental duty be performed with scrupulous fairness to the accused. We cannot say that it offends due process to leave the question of a convicted person's sanity to the solemn respon-

> sibility of a state's highest executive with authority to invoke the aid of the most skillful class of experts on the crucial questions involved." 339 U. S., at 12–13.

Even the sole dissenter in *Solesbee*, Justice Frankfurter, agreed that if the Constitution afforded condemned prisoners no substantive right not to be executed when insane, then the State would be free to place on the Governor the responsibility for determining sanity. *Id.*, at 15.

Petitioner argues that *Solesbee* is no longer controlling because it was decided "at a time when due process analysis still turned on the right-privilege distinction." Brief for Petitioner 8. But as petitioner concedes, his due process claim turns on a showing that the Florida statute at issue here created an individual right not to be executed while insane. Even a cursory reading of the statute reveals that the only right it creates in a condemned prisoner is to inform the Governor that the prisoner may be insane. Fla. Stat. § 922.07(1) (1985). The only legitimate expectation it creates is that "*[i]f the Governor decides* that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him, he shall have him committed to a Department of Corrections mental health treatment facility." § 922.07(3) (Supp. 1986) (emphasis added). Our recent cases in this area of the law may not be wholly consistent with one another. See *Olim* v. *Wakinekona*, 461 U. S. 238 (1983); *Hewitt* v. *Helms*, 459 U. S. 460 (1983); *Vitek* v. *Jones*, 445 U. S. 480 (1980); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1 (1979); *Meachum* v. *Fano*, 427 U. S. 215 (1976). I do not think this state of the law requires the conclusion that Florida has granted petitioner the sort of entitlement that gives rise to the procedural protections for which he contends.

In any event, I see no reason to reject the *Solesbee* Court's conclusion that wholly executive procedures can satisfy due process in the context of a post-trial, postappeal, post-collateral-attack challenge to a State's effort to carry out a lawfully imposed sentence. Creating a constitutional right to a judicial determination of sanity before that sentence may be carried out, whether through the Eighth Amendment or the Due Process Clause, needlessly complicates and postpones still further any finality in this area of the law. The defendant has already had a full trial on the issue of guilt, and a trial on the issue of penalty; the requirement of still a third adjudication offers an invitation to those who have nothing to lose by accepting it to advance entirely spurious claims of insanity. A claim of insanity may be made at any time before sentence and, once rejected, may be raised again; a prisoner found sane two days before execution might claim to have lost his sanity the next day, thus necessitating another judicial determination of his sanity and presumably another stay of his execution. See *Nobles* v. *Georgia*, 168 U. S. 398, 405–406 (1897).

Since no State sanctions execution of the insane, the real battle being fought in this case is over what procedures must accompany the inquiry into sanity. The Court reaches the result it does by examining the common law, creating a constitutional right that no State seeks to violate, and then concluding that the common-law procedures are inadequate to protect the newly created but common-law based right. I find it unnecessary to "constitutionalize" the already uniform view that the insane should not be executed, and inappropriate to "selectively incorporate" the common-law practice. I therefore dissent.

KUHLMANN, SUPERINTENDENT, SULLIVAN CORRECTIONAL FACILITY *v.* WILSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 84-1479. Argued January 14, 1986—Decided June 26, 1986

After his arraignment on charges arising from a 1970 robbery and murder in New York, respondent was confined in a cell with a prisoner, named Benny Lee, who had previously agreed to act as a police informant. Respondent made incriminating statements, and Lee reported them to the police. Prior to trial in a New York court, respondent moved to suppress the statements on the ground that they were obtained in violation of his Sixth Amendment right to counsel. After an evidentiary hearing, the trial court denied the motion, finding that Lee had obeyed a police officer's instructions only to listen to respondent for the purpose of identifying his confederates in the robbery and murder, but not to question respondent about the crimes. The court also found that respondent's statements to Lee were "spontaneous" and "unsolicited." In 1972, respondent was convicted of, and sentenced to imprisonment for, common-law murder and felonious possession of a weapon, and the Appellate Division affirmed. In 1973, respondent sought federal habeas corpus relief, asserting that his statements to Lee were obtained by police investigative methods that violated his Sixth Amendment rights. The District Court denied the writ, and the Court of Appeals affirmed. After the 1980 decision in *United States* v. *Henry*, 447 U. S. 264—which applied the "deliberately elicited" test of *Massiah* v. *United States*, 377 U. S. 201, to suppress statements made to a paid jailhouse informant—respondent unsuccessfully sought to have his conviction vacated by the state courts on the basis of his Sixth Amendment claim. In 1982, respondent filed the instant habeas corpus petition in Federal District Court, again asserting his Sixth Amendment claim. The District Court denied relief, but the Court of Appeals reversed. As an initial matter, the Court of Appeals concluded that under *Sanders* v. *United States*, 373 U. S. 1, the "ends of justice" required consideration of this petition for habeas corpus, notwithstanding the adverse determination on the merits of respondent's Sixth Amendment claim in the earlier federal habeas corpus proceedings. The court then held that under *Henry* respondent was entitled to relief.

Held: The judgment is reversed, and the case is remanded.

742 F. 2d 741, reversed and remanded.

JUSTICE POWELL delivered the opinion of the Court with respect to Parts I, IV, and V, concluding that the Court of Appeals erred in holding that respondent was entitled to relief under *United States* v. *Henry*, *supra*, which left open the question whether the Sixth Amendment forbids admission in evidence of an accused's statements to a jailhouse informant who was placed in close proximity but made no effort to stimulate conversations about the crime charged. Pp. 456–461.

(a) The primary concern of the *Massiah* and *Henry* line of decisions was secret interrogation by investigatory techniques that are the equivalent of direct police interrogation. Since the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached, a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks. Pp. 456–459.

(b) Under the circumstances of this case, the Court of Appeals' conclusion that respondent's right to counsel was violated because the police "deliberately elicited" incriminating statements was clear error in light of the provisions and intent of 28 U. S. C. § 2254(d), which requires that the state trial court's factual findings be accorded a presumption of correctness. Pp. 459–461.

JUSTICE POWELL, joined by THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR, delivered an opinion with respect to Parts II and III, concluding that the Court of Appeals erred in holding that the "ends of justice" would be served by entertaining respondent's present "successive" petition for habeas corpus, and that the District Court and the Court of Appeals should have dismissed this successive petition under 28 U. S. C. § 2244(b) on the ground that the prior judgment denying relief on respondent's identical Sixth Amendment claim was final. *Sanders* v. *United States* derived its "ends of justice" test directly from language of the then-applicable statute and left for another day the task of defining the considerations that properly support a decision to entertain a successive petition. Although § 2244(b) makes no reference to the "ends of justice," that phrase still may be used generally to describe the standard for identifying those cases where successive review may be appropriate. However, specific guidance should be given to the federal courts as to the kind of proof that a state prisoner must offer to establish that the "ends of justice" will be served by relitigation of claims previously decided against him. Balancing the State's interests in finality of convictions and the prisoner's interest in access to a forum compels the conclusion that the "ends of justice" are served by successive review only where the petitioner supplements his constitutional claim with a colorable showing of factual innocence. The prisoner must make his evidentiary showing even though—as argued in this case—the evidence of guilt may have been unlawfully admitted. Here, the Court of Appeals conceded that the evidence of respondent's guilt "was nearly overwhelming," and respondent's constitutional claim did not itself raise any question as to his guilt or innocence. Pp. 444–455.

POWELL, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, IV, and V, in which BURGER, C. J., and WHITE, BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined, and an opinion with respect to Parts II and III, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 461. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 461. STEVENS, J., filed a dissenting opinion, *post*, p. 476.

Steven R. Kartagener argued the cause for petitioner. With him on the briefs were *Mario Merola* and *Jeremy Gutman*.

Philip S. Weber argued the cause and filed a brief for respondent.

JUSTICE POWELL announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, IV, and V, and an opinion with respect to Parts II and III in which THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join.

This case requires us to define the circumstances under which federal courts should entertain a state prisoner's petition for writ of habeas corpus that raises claims rejected on a prior petition for the same relief.

I

In the early morning of July 4, 1970, respondent and two confederates robbed the Star Taxicab Garage in the Bronx, New York, and fatally shot the night dispatcher. Shortly before, employees of the garage had observed respondent, a former employee there, on the premises conversing with two other men. They also witnessed respondent fleeing after the robbery, carrying loose money in his arms. After eluding the police for four days, respondent turned himself in. Respondent admitted that he had been present when the crimes took place, claimed that he had witnessed the robbery, gave the police a description of the robbers, but denied knowing them. Respondent also denied any involvement in the robbery or murder, claiming that he had fled because he was afraid of being blamed for the crimes.

After his arraignment, respondent was confined in the Bronx House of Detention, where he was placed in a cell with a prisoner named Benny Lee. Unknown to respondent, Lee had agreed to act as a police informant. Respondent made incriminating statements that Lee reported to the police. Prior to trial, respondent moved to suppress the statements on the ground that they were obtained in violation of his right to counsel. The trial court held an evidentiary hearing on the suppression motion, which revealed that the statements were made under the following circumstances.

Before respondent arrived in the jail, Lee had entered into an arrangement with Detective Cullen, according to which Lee agreed to listen to respondent's conversations and report his remarks to Cullen. Since the police had positive evidence of respondent's participation, the purpose of placing Lee in the cell was to determine the identities of respondent's confederates. Cullen instructed Lee not to ask respondent any questions, but simply to "keep his ears open" for the names of the other perpetrators. Respondent first spoke to Lee about the crimes after he looked out the cellblock window at the Star Taxicab Garage, where the crimes had occurred. Respondent said, "someone's messing with me," and began talking to Lee about the robbery, narrating the same story that he had given the police at the time of his arrest. Lee advised respondent that this explanation "didn't sound too good,"[1] but respondent did not alter his story. Over the next few days, however, respondent changed details of his original account. Respondent then received a visit from his brother, who mentioned that members of his family were upset because they believed that respondent had murdered the dispatcher. After the visit, respondent again described the crimes to Lee. Respondent now admitted that he and two other men, whom he never identified, had planned and carried out the robbery, and had murdered the dispatcher. Lee informed Cullen of respondent's statements and furnished Cullen with notes that he had written surreptitiously while sharing the cell with respondent.

After hearing the testimony of Cullen and Lee,[2] the trial court found that Cullen had instructed Lee "to ask no questions of [respondent] about the crime but merely to listen as to what [respondent] might say in his presence." The court determined that Lee obeyed these instructions, that he "at no time asked any questions with respect to the crime," and that he "only listened to [respondent] and made notes regarding what [respondent] had to say." The trial court also found that respondent's statements to Lee were "spontaneous" and "unsolicited." Under state precedent, a defendant's volunteered statements to a police agent were admissible in evidence because the police were not required to prevent talkative defendants from making incriminating statements. See *People* v. *Kaye*, 25 N. Y. 2d 139, 145, 250 N. E. 2d 329, 332 (1969). The trial court accordingly denied the suppression motion.

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[1] At the suppression hearing, Lee testified that, after hearing respondent's initial version of his participation in the crimes, "I think I remember telling him that the story wasn't—it didn't sound too good. Things didn't look too good for him." At trial, Lee testified to a somewhat different version of his remark: "Well, I said, look, you better come up with a better story than that because that one doesn't sound too cool to me, that's what I said."

[2] Respondent did not testify at the suppression hearing.

The jury convicted respondent of common-law murder and felonious possession of a weapon. On May 18, 1972, the trial court sentenced him to a term of 20 years to life on the murder count and to a concurrent term of up to 7 years on the weapons count. The Appellate Division affirmed without opinion, *People* v. *Wilson*, 41 App. Div. 2d 903, 343 N. Y. S. 2d 563 (1973), and the New York Court of Appeals denied respondent leave to appeal.

On December 7, 1973, respondent filed a petition for federal habeas corpus relief. Respondent argued, among other things, that his statements to Lee were obtained pursuant to police investigative methods that violated his constitutional rights. After considering *Massiah* v. *United States*, 377 U. S. 201 (1964), the District Court for the Southern District of New York denied the writ on January 7, 1977. The record demonstrated "no interrogation whatsoever" by Lee and "only spontaneous statements" from respondent. In the District Court's view, these "fact[s] preclude[d] any Sixth Amendment violation."

A divided panel of the Court of Appeals for the Second Circuit affirmed. *Wilson* v. *Henderson*, 584 F. 2d 1185 (1978). The court noted that a defendant is denied his Sixth Amendment rights when the trial court admits in evidence incriminating statements that state agents "'had deliberately elicited from him after he had been indicted and in the absence of counsel.'" *Id.*, at 1189, quoting *Massiah* v. *United States*, *supra*, at 206. Relying in part on *Brewer* v. *Williams*, 430 U. S. 387 (1977), the court reasoned that the "deliberately elicited" test of *Massiah* requires something more than incriminating statements uttered in the absence of counsel. On the facts found by the state trial court, which were entitled to a presumption of correctness under 28 U. S. C. §2254(d), the court held that respondent had not established a violation of his Sixth Amendment rights.[3] We denied a petition for a writ of certiorari. *Wilson* v. *Henderson*, 442 U. S. 945 (1979).

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[3] The Court of Appeals observed that suppression of respondent's statements would serve "no useful purpose" because Cullen had not engaged in

Following this Court's decision in *United States* v. *Henry*, 447 U. S. 264 (1980), which applied the *Massiah* test to suppress statements made to a paid jailhouse informant, respondent decided to relitigate his Sixth Amendment claim. On September 11, 1981, he filed in state trial court a motion to vacate his conviction. The judge denied the motion, on the grounds that *Henry* was factually distinguishable from this case,[4] and that under state precedent *Henry* was not to be given retroactive effect, see *People* v. *Pepper*, 53 N. Y. 2d 213, 423 N. E. 2d 366 (1981). The Appellate Division denied respondent leave to appeal.

On July 6, 1982, respondent returned to the District Court for the Southern District of New York on a habeas petition, again arguing that admission in evidence of his incriminating statements to Lee violated his Sixth Amendment rights. Respondent contended that the decision in *Henry* constituted a new rule of law that should be applied retroactively to this case. The District Court found it unnecessary to consider retroactivity because it decided that *Henry* did not undermine the Court of Appeals' prior disposition of respondent's Sixth Amendment claim. Noting that *Henry* reserved the question whether the Constitution forbade admission in evidence of an accused's statements to an informant who made "no effort to stimulate conversations about the crime charged," see *United States* v. *Henry*, *supra*, at 271, n. 9,

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"reprehensible police behavior," but rather had made a "conscious effort" to protect respondent's "constitutional rights [under *Massiah*] while pursuing a crucial homicide investigation." *Wilson* v. *Henderson*, 584 F. 2d, at 1191.

Judge Oakes dissented, arguing that the "deliberately elicited" test of *Massiah* proscribed admission in evidence of an accused's statements obtained pursuant to the investigatory tactics used here. *Id.*, at 1194–1195.

[4] The trial judge found that *United States* v. *Henry* was distinguishable because the jailhouse informant in that case was paid for reporting the defendant's statements to the police.

the District Court believed that this case presented that open question and that the question must be answered negatively. The District Court noted that the trial court's findings were presumptively correct, see 28 U. S. C. § 2254(d), and were fully supported by the record. The court concluded that these findings were "fatal" to respondent's claim under *Henry* since they showed that Lee made no "affirmative effort" of any kind "to elicit information" from respondent.

A different, and again divided, panel of the Court of Appeals reversed. *Wilson* v. *Henderson*, 742 F. 2d 741 (1984). As an initial matter, the court stated that, under *Sanders* v. *United States*, 373 U. S. 1 (1963), the "ends of justice" required consideration of this petition, notwithstanding the fact that the prior panel had determined the merits adversely to respondent. 742 F. 2d, at 743. The court then reasoned that the circumstances under which respondent made his incriminating statements to Lee were indistinguishable from the facts of *Henry*. Finally, the court decided that *Henry* was fully applicable here because it did not announce a new constitutional rule, but merely applied settled principles to new facts. 742 F. 2d, at 746–747. Therefore, the court concluded that all of the judges who had considered and rejected respondent's claim had erred, and remanded the case to the District Court with instructions to order respondent's release from prison unless the State elected to retry him.[5]

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[5] Judge Van Graafeiland, dissenting, observed that the majority conceded that there had been no change in the law that had "transformed conduct that we formerly held to be constitutional into conduct that is now unconstitutional." 742 F. 2d, at 749. Thus, the majority's rejection of the conclusion reached by the judges who previously had considered respondent's claim was based on its refusal to accept the trial court's factual determinations. *Id.*, at 748. The dissent criticized the majority for disregarding "the presumption that the State court's factual findings are correct, 28 U. S. C. § 2254(d), without an adequate explanation as to why the findings are not fairly supported by the record." *Id.*, at 749. In Judge Van Graafeiland's view, "[a] boilerplate statement that the 'ends of justice'

We granted certiorari, 472 U. S. 1026 (1985), to consider the Court of Appeals' decision that the "ends of justice" required consideration of this successive habeas corpus petition and that court's application of our decision in *Henry* to the facts of this case. We now reverse.

II

A

In concluding that it was appropriate to entertain respondent's successive habeas corpus petition, the Court of Appeals relied upon *Sanders* v. *United States*, 373 U. S. 1 (1963), which announced guidelines for the federal courts to follow when presented with habeas petitions or their equivalent claimed to be "successive" or an "abuse of the writ."[6] The narrow question in *Sanders* was whether a federal prisoner's motion under 28 U. S. C. § 2255 was properly denied without a hearing on the ground that the motion constituted a successive application. *Id.*, at 4–6. The Court undertook not only to answer that question, but also to explore the standard that should govern district courts' consideration of successive petitions. *Sanders* framed the inquiry in terms of the requirements of the "ends of justice," advising district courts to dismiss habeas petitions or their equivalent raising claims determined adversely to the prisoner on a prior petition if

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justify reconsideration on the merits does not warrant rejection of all that has gone on before." *Ibid.* (citations omitted).

[6] The terms "successive petition" and "abuse of the writ" have distinct meanings. A "successive petition" raises grounds identical to those raised and rejected on the merits on a prior petition. See *Sanders* v. *United States*, 373 U. S., at 15–17. Our decision today concerns the circumstances under which district courts properly should entertain the merits of such a petition. The concept of "abuse of the writ" is founded on the equitable nature of habeas corpus. Thus, where a prisoner files a petition raising grounds that were available but not relied upon in a prior petition, or engages in other conduct that "disentitle[s] him to the relief he seeks," the federal court may dismiss the subsequent petition on the ground that the prisoner has abused the writ. *Id.*, at 17–19.

"the ends of justice would not be served by reaching the merits of the subsequent application." *Id.*, at 15, 16–17. While making clear that the burden of proof on this issue rests on the prisoner, *id.*, at 17, the Court in *Sanders* provided little specific guidance as to the kind of proof that a prisoner must offer to establish that the "ends of justice" would be served by relitigation of the claims previously decided against him.

The Court of Appeals' decision in this case demonstrates the need for this Court to provide that guidance. The opinion of the Court of Appeals sheds no light on this important threshold question, merely declaring that the "ends of justice" required successive federal habeas corpus review. Failure to provide clear guidance leaves district judges "at large in disposing of applications for a writ of habeas corpus," creating the danger that they will engage in "the exercise not of law but of arbitrariness." *Brown* v. *Allen*, 344 U. S. 443, 497 (1953) (opinion of Frankfurter, J.). This Court therefore must now define the considerations that should govern federal courts' disposition of successive petitions for habeas corpus.

B

Since 1867, when Congress first authorized the federal courts to issue the writ on behalf of persons in state custody,[7] this Court often has been called upon to interpret the language of the statutes defining the scope of that jurisdiction. It may be helpful to review our cases construing these frequently used statutes before we answer the specific question before us today.

Until the early years of this century, the substantive scope of the federal habeas corpus statutes was defined by reference to the scope of the writ at common law, where the courts' inquiry on habeas was limited exclusively "to the jurisdiction of the sentencing tribunal." *Stone* v. *Powell*, 428 U. S. 465, 475 (1976). See *Wainwright* v. *Sykes*, 433 U. S. 72, 78, 79 (1977); see also Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L. Rev. 451, 458–468 (1966). Thus, the finality of the judgment of a committing court of competent jurisdiction was accorded absolute respect on habeas review. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 254–256 (1973) (POWELL, J., concurring). During this century, the Court gradually expanded the grounds on which habeas corpus relief was available, authorizing use of the writ to challenge convictions where the prisoner claimed a violation of certain constitutional rights. See *Wainwright* v. *Sykes*, *supra*, at 79–80; *Stone* v. *Powell*, *supra*, at 475–478. The Court initially accomplished this expansion while purporting to adhere to the inquiry into the sentencing court's jurisdiction. *Wainwright* v. *Sykes*, 433 U. S., at 79. Ultimately, the Court abandoned the concept of jurisdiction and acknowledged that habeas "review is available for claims of 'disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.'" *Ibid.*, quoting *Waley* v. *Johnston*, 316 U. S. 101, 104–105 (1942).

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[7] The Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81, the first grant of jurisdiction to the federal courts, included authority to issue the writ of habeas corpus *ad subjiciendum* on behalf of federal prisoners. In 1867, Congress authorized the federal courts to grant habeas relief to persons in the custody of the States. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. See *Stone* v. *Powell*, 428 U. S. 465, 474–475 (1976).

Our decisions have not been limited to expanding the scope of the writ. Significantly, in *Stone* v. *Powell*, we removed from the reach of the federal habeas statutes a state prisoner's claim that "evidence obtained in an unconstitutional search or seizure was introduced at his trial" unless the prisoner could show that the State had failed to provide him "an opportunity for full and fair litigation" of his Fourth Amendment claim. 428 U. S., at 494 (footnotes omitted). Although the Court previously had accepted jurisdiction of search and seizure claims, *id.*, at 480, we were persuaded that any "advance of the legitimate goal of furthering Fourth Amendment rights" through application of the judicially created exclusionary rule on federal habeas was "outweighed by the acknowledged costs to other values vital to a rational system of criminal justice." *Id.*, at 494. Among those costs were diversion of the attention of the participants at a criminal trial "from the ultimate question of guilt or innocence," and exclusion of reliable evidence that was "often the most probative information bearing on the guilt or innocence of the defendant." *Id.*, at 490. Our decision to except this category of claims from habeas corpus review created no danger that we were denying a "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty." *Id.*, at 491–492, n. 31. Rather, a convicted defendant who pressed a search and seizure claim on collateral attack was "usually asking society to redetermine an issue that ha[d] no bearing on the basic justice of his incarceration." *Id.*, at 492, n. 31.

In decisions of the past two or three decades construing the reach of the habeas statutes, whether reading those statutes broadly or narrowly, the Court has reaffirmed that "habeas corpus has traditionally been regarded as governed by equitable principles." *Fay* v. *Noia*, 372 U. S. 391, 438 (1963), citing *United States ex rel. Smith* v. *Baldi*, 344 U. S. 561, 573 (1953) (dissenting opinion). See *Stone* v. *Powell*, *supra*, at 478, n. 11. The Court uniformly has been guided by the proposition that the writ should be available to afford relief to those "persons whom society has grievously wronged" in light of modern concepts of justice. *Fay* v. *Noia*, *supra*, at 440–441. See *Stone* v. *Powell*, *supra*, at 492, n. 31. Just as notions of justice prevailing at the inception of habeas corpus were offended when a conviction was issued by a court that lacked jurisdiction, so the modern conscience found intolerable convictions obtained in violation of certain constitutional commands. But the Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error. Rather, the Court has performed its statutory task through a sensitive weighing of the interests implicated by federal habeas corpus adjudication of constitutional claims determined adversely to the prisoner by the state courts. *E. g.*, *Engle* v. *Isaac*, 456 U. S. 107, 126–129 (1982); *Stone* v. *Powell*, *supra*, at 489–495; *Fay* v. *Noia*, *supra*, at 426–434.[8]

III

A

The Court in *Sanders* drew the phrase "ends of justice" directly from the version of 28 U. S. C. § 2244 in effect in 1963. The provision, which then governed petitions filed by both federal and state prisoners, stated in relevant part that no federal judge "shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person . . . , if it appears that the legality of such detention has been determined" by a federal court "on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge . . . is satisfied that the *ends of justice will not be served by such inquiry*." 28 U. S. C. § 2244 (1964 ed.) (emphasis added). Accordingly, in describing guidelines for successive petitions, *Sanders* did little more than quote the language of the then-pertinent statute, leaving for another day the task of giving that language substantive content.

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[8] Contrary to the suggestion of JUSTICE BRENNAN's dissent, our cases deciding that federal habeas review ordinarily does not extend to procedurally defaulted claims plainly concern the "general scope of the writ." *Post*, at 464. The point of those decisions is that, on balancing the competing interests implicated by affording federal collateral relief to persons in state custody, federal courts should not exercise habeas corpus jurisdiction over a certain category of constitutional claims, whether or not those claims are meritorious. Whether one characterizes those decisions as carving out an "exception" to federal habeas jurisdiction, as the dissent apparently prefers to do, *post*, at 465, n. 3, or as concerning the scope of that jurisdiction, the result is the same, and was reached under a framework of analysis that weighed the pertinent interests. Similarly, in *Fay* v. *Noia*, JUSTICE BRENNAN's opinion for the Court expressly made a "practical appraisal of the state interest" in a system of procedural forfeitures, weighing that interest against the other interests implicated by federal collateral review of procedurally defaulted claims. 372 U. S., at 433. Of course, that the Court in *Noia* adopted an expansive reading of the scope of the writ does not undercut the fact that it did so by balancing competing interests.

In 1966, Congress carefully reviewed the habeas corpus statutes and amended their provisions, including § 2244. Section 2244(b), which we construe today, governs successive petitions filed by state prisoners. The section makes no reference to the "ends of justice,"[9] and provides that the federal courts "need not" entertain "subsequent applications" from state prisoners "unless the application alleges and is predicated on a factual or other ground not adjudicated on" the prior application "and unless the court . . . is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ."[10] In construing this language, we are cognizant that Congress adopted the section in light of the need—often recognized by this Court—to weigh the interests of the individual prisoner against the sometimes contrary interests of the State in administering a fair and rational system of criminal laws.[11]

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[9] In § 2244(a), which now governs successive petitions filed by federal prisoners, Congress preserved virtually intact the language of former § 2244, including the reference to the "ends of justice."

[10] Title 28 U. S. C. § 2244(b) provides:

"When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ."

[11] Sensitivity to the interests implicated by federal habeas corpus review is implicit in the statutory command that the federal courts "shall . . . dis-

The legislative history demonstrates that Congress intended the 1966 amendments, including those to § 2244(b), to introduce "a greater degree of finality of judgments in habeas corpus proceedings." S. Rep. No. 1797, 89th Cong., 2d Sess., 2 (1966) (Senate Report). Congress was concerned with the "steadily increasing" burden imposed on the federal courts by "applications by State prisoners for writs of habeas corpus."[12] *Id.*, at 1; see H. R. Rep. No. 1892, 89th Cong., 2d Sess., 5–6 (1966) (House Report). In many instances, the "heavy burden" created by these applications was "unnecessary" because state prisoners "have been filing applications either containing allegations identical to those asserted in a previous application that has been denied, or predicated upon grounds obviously well known to them when they filed the preceding application." Senate Report, at 2; see House Report, at 5. The Senate Report explicitly states that the "purpose" of the amendments was to "alleviate the unnecessary burden" by adding "to section 2244 . . . provisions for a qualified application of the doctrine of res judicata." Senate Report, at 2; see House Report, at 8. The House also

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pose of the matter as law *and justice* require." 28 U. S. C. § 2243 (emphasis added).

[12] The Senate Report incorporates a letter from Senior Circuit Judge Orie L. Phillips to Senator Joseph D. Tydings that states:

"The need for this legislation . . . is demonstrated by the fact that the number of applications for writs of habeas corpus in Federal courts by State court prisoners increased from 134 in 1941 to 814 in 1957. In fiscal 1963, 1,692 applications for the writ were filed by State court prisoners; in fiscal 1964, 3,248 such applications were filed; in fiscal 1965, 4,845 such applications were filed; and in the first 9 months of fiscal 1966, 3,773 such applications were filed, yet less than 5 percent of such applications were decided by the Federal district courts in favor of the applicant for the writ. More than 95 percent were held to be without merit." Senate Report, at 4, 5–6.

Since 1966, the burden imposed by applications for federal habeas corpus filed by state prisoners has continued to increase. In 1966, a total of 5,339 such applications was filed. In 1985, 8,534 applications were filed. Annual Report of the Director of the Administrative Office of the U. S. Courts (1985).

expressed concern that the increasing number of habeas applications from state prisoners "greatly interfered with the procedures and processes of the State courts by delaying, in many cases, the proper enforcement of their judgments." *Id.*, at 5.

Based on the 1966 amendments and their legislative history, petitioner argues that federal courts no longer must consider the "ends of justice" before dismissing a successive petition. We reject this argument. It is clear that Congress intended for district courts, as the general rule, to give preclusive effect to a judgment denying on the merits a habeas petition alleging grounds identical in substance to those raised in the subsequent petition. But the permissive language of § 2244(b) gives federal courts discretion to entertain successive petitions under some circumstances. Moreover, Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts, which was amended in 1976, contains similar permissive language, providing that the district court "may" dismiss a "second or successive petition" that does not "allege new or different grounds for relief." Consistent with Congress' intent in enacting § 2244(b), however, the Advisory Committee Note to Rule 9(b), 28 U. S. C., p. 358, states that federal courts should entertain successive petitions only in "rare instances."[13] Unless those "rare instances" are to be identified by whim or caprice, district judges must be given guidance for determining when to exercise the limited discretion granted them by § 2244(b). Accordingly, as a means of identifying the rare case in which federal courts should exercise their discretion to hear a successive petition, we continue to rely on the reference in *Sanders* to the "ends of justice." Our task is to provide a definition of the "ends of justice" that will accommodate Congress' intent to give finality to federal habeas judgments with the historic function of habeas corpus to provide relief from unjust incarceration.

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[13] The Advisory Committee Note relies on the "ends of justice" inquiry described in *Sanders* to identify the unusual case where a successive petition should be heard.

B

We now consider the limited circumstances under which the interests of the prisoner in relitigating constitutional claims held meritless on a prior petition may outweigh the countervailing interests served by according finality to the prior judgment. We turn first to the interests of the prisoner.

The prisoner may have a vital interest in having a second chance to test the fundamental justice of his incarceration. Even where, as here, the many judges who have reviewed the prisoner's claims in several proceedings provided by the State and on his first petition for federal habeas corpus have determined that his trial was free from constitutional error, a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated. That interest does not extend, however, to prisoners whose guilt is conceded or plain. As Justice Harlan observed, the guilty prisoner himself has "an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." *Sanders* v. *United States*, 373 U. S., at 24–25 (dissenting).

Balanced against the prisoner's interest in access to a forum to test the basic justice of his confinement are the interests of the State in administration of its criminal statutes. Finality serves many of those important interests. Availability of unlimited federal collateral review to guilty defendants frustrates the State's legitimate interest in deterring crime, since the deterrent force of penal laws is diminished to the extent that persons contemplating criminal activity believe there is a possibility that they will escape punishment through repetitive collateral attacks.[14] See *Engle* v. *Isaac*, 456 U. S., at 127–128, n. 32. Similarly, finality serves the State's goal of rehabilitating those who commit crimes because "[r]ehabilitation demands that the convicted defendant realize that 'he is justly subject to sanction, that he stands in need of rehabilitation.'" *Id.*, at 128, n. 32 (quoting Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 452 (1963)). See *Schneckloth* v. *Bustamonte*, 412 U. S., at 262 (POWELL, J., concurring). Finality also serves the State's legitimate punitive interests. When a prisoner is freed on a successive petition, often many years after his crime, the State may be unable successfully to retry him.[15] *Peyton* v. *Rowe*, 391 U. S. 54, 62 (1968). This result is unacceptable if the State must forgo conviction of a guilty defendant through the "erosion of memory" and "dispersion of witnesses" that occur with the passage of time that invariably attends collateral attack.[16]

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[14] "Deterrence depends upon the expectation that 'one violating the law will swiftly and certainly become subject to punishment, just punishment.'" *Engle* v. *Isaac*, 456 U. S. 107, 127–128, n. 32 (1982), quoting Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 452 (1963).

[15] Where the prisoner secures his release on a successive petition, the delay between the crime and retrial following issuance of the writ often will be substantial. The delay in this case is illustrative. Respondent committed the robbery and murder in 1970, and was convicted in 1972. Direct appeal was completed in 1973. The intervening years have been largely consumed by federal habeas corpus review, with the past four years devoted to relitigation of respondent's claim that admission in evidence of his statements to Lee violated the Sixth Amendment.

[16] Finality serves other goals important to our system of criminal justice and to federalism. Unlimited availability of federal collateral attack burdens our criminal justice system as successive petitions divert the "time of judges, prosecutors, and lawyers" from the important task of trying criminal cases. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 148–149 (1970). See *Engle* v. *Isaac*, *supra*, at 127. Federal habeas review creates friction between our state and federal courts, as state judges—however able and thorough—know that their judgments may be set aside by a single federal judge,

Engle v. *Isaac*, *supra*, at 127–128; Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 146–148 (1970).

In the light of the historic purpose of habeas corpus and the interests implicated by successive petitions for federal habeas relief from a state conviction, we conclude that the "ends of justice" require federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence. This standard was proposed by Judge Friendly more than a decade ago as a prerequisite for federal habeas review generally. Friendly, *supra*. As Judge Friendly persuasively argued then, a requirement that the prisoner come forward with a colorable showing of innocence identifies those habeas petitioners who are justified in again seeking relief from their incarceration. We adopt this standard now to effectuate the clear intent of Congress that successive federal habeas review should be granted only in rare cases, but that it should be available when the ends of justice so require. The prisoner may make the requisite showing by establishing that under the probative evidence he has a colorable claim of factual innocence. The prisoner must make his evidentiary showing even though—as argued in this case—the evidence of guilt may have been unlawfully admitted.[17]

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years after it was entered and affirmed on direct appeal. See 456 U. S., at 128. Moreover, under our federal system the States "possess primary authority for defining and enforcing the criminal law," and "hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Ibid.*, citing *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 263–265 (1983) (POWELL, J., concurring). Despite those costs, Congress has continued to afford federal habeas relief in appropriate cases, "recognizing the need in a free society for an additional safeguard against compelling an innocent [person] to suffer an unconstitutional loss of liberty." *Stone* v. *Powell*, 428 U. S., at 491–492, n. 31.

[17] As Judge Friendly explained, a prisoner does not make a colorable showing of innocence "by showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been uncon-

C

Applying the foregoing standard in this case, we hold that the Court of Appeals erred in concluding that the "ends of justice" would be served by consideration of respondent's successive petition. The court conceded that the evidence of respondent's guilt "was nearly overwhelming." 742 F. 2d, at 742. The constitutional claim argued by respondent does not itself raise any question as to his guilt or innocence. The District Court and the Court of Appeals should have dismissed this successive petition under § 2244(b) on the ground that the prior judgment denying relief on this identical claim was final.[18]

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stitutionally obtained." Friendly, *supra*, at 160. Rather, the prisoner must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt." *Ibid.* (footnote omitted). Thus, the question whether the prisoner can make the requisite showing must be determined by reference to *all* probative evidence of guilt or innocence.

[18] JUSTICE BRENNAN's dissenting opinion mischaracterizes our opinion in several respects. The dissent states that the plurality "*implies* that federal habeas review is not available as a matter of right to a prisoner who alleges in his *first* federal petition a properly preserved [constitutional claim]." *Post*, at 462 (emphasis added). This case involves, and our opinion describes, *only* the standard applicable to *successive* petitions for federal habeas corpus relief. Thus, the first six pages of the dissent have little, if any, relevance to this case. There, JUSTICE BRENNAN merely reiterates at length his views as to the general scope of federal habeas corpus jurisdiction, with no explanation of how those views apply when a district judge is required to consider a habeas corpus petition presenting an issue decided on the merits in a previous federal habeas proceeding.

The dissent further mistakenly asserts that we reject *Sanders'* holding that the question whether successive review is proper should be decided under a "'sound discretion' standard." *Post*, at 462. As we have stated, the permissive language of § 2244(b) of course gives the federal courts discretion to decide whether to entertain a successive petition, and since *Sanders* those courts have relied on the phrase "ends of justice" as a general standard for identifying cases in which successive review may be appropriate. What *Sanders* left open—and the dissent today ignores—is the

IV

Even if the Court of Appeals had correctly decided to entertain this successive habeas petition, we conclude that it erred in holding that respondent was entitled to relief under *United States* v. *Henry*, 447 U. S. 264 (1980). As the District Court observed, *Henry* left open the question whether the Sixth Amendment forbids admission in evidence of an accused's statements to a jailhouse informant who was "placed in close proximity but [made] no effort to stimulate conversations about the crime charged." *Id.*, at 271, n. 9.[19] Our review of the line of cases beginning with *Massiah* v. *United States*, 377 U. S. 201 (1964), shows that this question must, as the District Court properly decided, be answered negatively.

A

The decision in *Massiah* had its roots in two concurring opinions written in *Spano* v. *New York*, 360 U. S. 315 (1959). See *Maine* v. *Moulton*, 474 U. S. 159, 172 (1985). Following his indictment for first-degree murder, the defendant in *Spano* retained a lawyer and surrendered to the authorities. Before leaving the defendant in police custody, counsel cautioned him not to respond to interrogation. The prosecutor and police questioned the defendant, persisting in the face of his repeated refusal to answer and his repeated request to speak with his lawyer. The lengthy interrogation involved improper police tactics, and the defendant ultimately con-

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critical question of what considerations should inform a court's decision that successive review of an issue previously decided will serve the "ends of justice." While the dissent today purports to provide some substance to the *Sanders* standard by requiring a "good justification" for relitigation of a claim previously decided, its standard provides no real guidance to federal courts confronted with successive claims for habeas corpus relief. As to the need for a standard, see *supra*, at 445.

[19] In *Maine* v. *Moulton*, 474 U. S. 159 (1985), we again reserved this question, declining to reach the situation where the informant acts simply as a "'listening post'" without "participat[ing] in active conversation and prompt[ing] particular replies." *Id.*, at 177, n. 13.

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fessed. Following a trial at which his confession was admitted in evidence, the defendant was convicted and sentenced to death. 360 U. S., at 316–320. Agreeing with the Court that the confession was involuntary and thus improperly admitted in evidence under the Fourteenth Amendment, the concurring Justices also took the position that the defendant's right to counsel was violated by the secret interrogation. *Id.*, at 325 (Douglas, J., concurring). As Justice Stewart observed, an indicted person has the right to assistance of counsel throughout the proceedings against him. *Id.*, at 327. The defendant was denied that right when he was subjected to an "all-night inquisition," during which police ignored his repeated requests for his lawyer. *Ibid.*

The Court in *Massiah* adopted the reasoning of the concurring opinions in *Spano* and held that, once a defendant's Sixth Amendment right to counsel has attached, he is denied that right when federal agents "deliberately elicit" incriminating statements from him in the absence of his lawyer. 377 U. S., at 206. The Court adopted this test, rather than one that turned simply on whether the statements were obtained in an "interrogation," to protect accused persons from "'indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent.'" *Ibid.*, quoting *United States* v. *Massiah*, 307 F. 2d 62, 72–73 (1962) (Hays, J., dissenting in part). Thus, the Court made clear that it was concerned with interrogation or investigative techniques that were equivalent to interrogation, and that it so viewed the technique in issue in *Massiah*.[20]

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[20] The defendant in *Massiah* made the incriminating statements in a conversation with one of his confederates, who had secretly agreed to permit Government agents to listen to the conversation over a radio transmitter. The agents instructed the confederate to "engage Massiah in conversation relating to the alleged crimes." *United States* v. *Massiah*, 307 F. 2d, at 72 (Hays, J., dissenting in part).

In *United States* v. *Henry*, the Court applied the *Massiah* test to incriminating statements made to a jailhouse informant. The Court of Appeals in that case found a violation of *Massiah* because the informant had engaged the defendant in conversations and "had developed a relationship of trust and confidence with [the defendant] such that [the defendant] revealed incriminating information." 447 U. S., at 269. This Court affirmed, holding that the Court of Appeals reasonably concluded that the Government informant "deliberately used his position to secure incriminating information from [the defendant] when counsel was not present." *Id.*, at 270. Although the informant had not questioned the defendant, the informant had "stimulated" conversations with the defendant in order to "elicit" incriminating information. *Id.*, at 273; see *id.*, at 271, n. 9. The Court emphasized that those facts, like the facts of *Massiah*, amounted to "'indirect and surreptitious interrogatio[n]'" of the defendant. 447 U. S., at 273.

Earlier this Term, we applied the *Massiah* standard in a case involving incriminating statements made under circumstances substantially similar to the facts of *Massiah* itself. In *Maine* v. *Moulton*, 474 U. S. 159 (1985), the defendant made incriminating statements in a meeting with his accomplice, who had agreed to cooperate with the police. During that meeting, the accomplice, who wore a wire transmitter to record the conversation, discussed with the defendant the charges pending against him, repeatedly asked the defendant to remind him of the details of the crime, and encouraged the defendant to describe his plan for killing witnesses. *Id.*, at 165–166, and n. 4. The Court concluded that these investigatory techniques denied the defendant his right to counsel on the pending charges.[21] Significantly, the Court emphasized that, because of the relationship between the defendant and the informant, the informant's engaging the defendant "in active conversation about their upcoming trial was certain to elicit" incriminating statements from the defendant. *Id.*, at 177, n. 13. Thus, the informant's participation "in this conversation was 'the functional equivalent of interrogation.'" *Ibid.* (quoting *United States* v. *Henry*, 447 U. S., at 277 (POWELL, J., concurring)).

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[21] The Court observed, however, that where the defendant makes "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached," those statements "are, of course, admissible at a trial of those offenses." 474 U. S., at 180, n. 16.

As our recent examination of this Sixth Amendment issue in *Moulton* makes clear, the primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation. Since "the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached," 474 U. S., at 176, citing *United States* v. *Henry*, *supra*, at 276 (POWELL, J., concurring), a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.

B

It is thus apparent that the Court of Appeals erred in concluding that respondent's right to counsel was violated under the circumstances of this case. Its error did not stem from any disagreement with the District Court over appropriate resolution of the question reserved in *Henry*, but rather from its implicit conclusion that this case did not present that open question. That conclusion was based on a fundamental mistake, namely, the Court of Appeals' failure to accord to the state trial court's factual findings the presumption of correctness expressly required by 28 U. S. C. § 2254(d). *Patton* v. *Yount*, 467 U. S. 1025 (1984); *Sumner* v. *Mata*, 449 U. S. 539 (1981).

The state court found that Officer Cullen had instructed Lee only to listen to respondent for the purpose of determining the identities of the other participants in the robbery and murder. The police already had solid evidence of respondent's participation.[22] The court further found that Lee followed those instructions, that he "at no time asked any questions" of respondent concerning the pending charges, and that he "only listened" to respondent's "spontaneous" and "unsolicited" statements. The only remark made by Lee that has any support in this record was his comment that respondent's initial version of his participation in the crimes "didn't sound too good." Without holding that any of the state court's findings were not entitled to the presumption of correctness under § 2254(d),[23] the Court of Appeals focused on that one remark and gave a description of Lee's interaction with respondent that is completely at odds with the facts found by the trial court. In the Court of Appeals' view, "[s]ubtly and slowly, but surely, Lee's ongoing verbal intercourse with [respondent] served to exacerbate [respondent's] already troubled state of mind."[24] 742 F. 2d, at 745. After thus revising some of the trial court's findings, and ignoring other more relevant findings, the Court of Appeals concluded that the police "deliberately elicited" respondent's incriminating statements. *Ibid.* This conclusion conflicts with the decision of every other state and federal judge who reviewed this record, and is clear error in light of the provisions and intent of § 2254(d).

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[22] Eyewitnesses had identified respondent as the man they saw fleeing from the garage with an armful of money.

[23] The majority did not respond to Judge Van Graafeiland's criticism that the court could not "dispense with the presumption that the State court's factual findings are correct without an adequate explanation as to why the findings are not fairly supported by the record." 742 F. 2d, at 749 (citations omitted).

[24] Curiously, the Court of Appeals expressed concern that respondent was placed in a cell that overlooked the scene of his crimes. *Id.*, at 745. For all the record shows, however, that fact was sheer coincidence. Nor do we perceive any reason to require police to isolate one charged with crime so that he cannot view the scene, whatever it may be, from his cell window.

V

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE BURGER, concurring.

I agree fully with the Court's opinion and judgment. This case is clearly distinguishable from *United States* v. *Henry*, 447 U. S. 264 (1980). There is a vast difference between placing an "ear" in the suspect's cell and placing a voice in the cell to encourage conversation for the "ear" to record.

Furthermore, the abuse of the Great Writ needs to be curbed so as to limit, if not put a stop to, the "sporting contest" theory of criminal justice so widely practiced today.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Because I believe that the Court of Appeals correctly concluded that the "ends of justice" would be served by plenary consideration of respondent's second federal habeas petition and that *United States* v. *Henry*, 447 U. S. 264 (1980), directly controls the merits of this case, I dissent.

I

In *Sanders* v. *United States*, 373 U. S. 1, 15 (1963), we held that a federal court may refuse to entertain a successive petition for habeas relief or its equivalent under 28 U. S. C. § 2255 where "the ends of justice would not be served by reaching the merits of the subsequent application." The decision whether to hear a successive petition, we stated, was committed "to the sound discretion of the federal trial judges." *Id.*, at 18. We declined to define precisely "the ends of justice," observing that the phrase "cannot be too finely particularized." *Id.*, at 17.

Today four Members of the Court argue that we should reject *Sanders*' "sound discretion" standard and contend that the ends of justice are served by reconsideration of issues raised in previous federal habeas petitions *only* where the prisoner can make a colorable showing of factual innocence.[1] *Ante*, at 454, and n. 17. In support of this standard for consideration of successive petitions, the plurality advances a revisionist theory of this Court's habeas corpus jurisprudence. The plurality implies that federal habeas review is not available as a matter of right to a prisoner who alleges in his first federal petition a properly preserved claim that his conviction was obtained in violation of constitutional commands. Rather, the plurality suggests that a prisoner is entitled to habeas relief only if his interest in freedom from unconstitutional incarceration outweighs the State's interests in the administration of its criminal laws. *Ante*, at 452–453, and nn. 14–16. The plurality further intimates that federal review of state-court convictions under 28 U. S. C. § 2254 is predicated solely on the need to prevent the incarceration of an innocent person, stating that "[d]espite [the substantial] costs [federal habeas review imposes upon the States], Congress has continued to afford federal habeas relief in appropriate cases, 'recognizing the need in a free society for an additional safeguard against compelling an innocent [person] to suffer an unconstitutional loss of liberty.'" *Ante*, at 454, n. 16 (quoting *Stone* v. *Powell*, 428 U. S. 465, 491–492, n. 31 (1976)). Having thus implied that factual innocence is central to our habeas jurisprudence generally, the plurality declares that it is fundamental to the proper interpretation of "the ends of justice." Neither the plurality's standard for consideration of successive petitions nor its theory of habeas corpus is supported by statutory language, legislative history, or our precedents.[2]

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[1] While a majority of the Court today rejects, either implicitly or explicitly, this argument, I believe it appropriate to explain why the plurality's view is incorrect.

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[2] The plurality asserts, *ante*, at 455–456, n. 18, that it addresses *only* the standard applicable to successive habeas petitions and that I mischaracterize its opinion by suggesting that the dictum, contained in Part II–B of the plurality's opinion, regarding the purpose and the scope of the Great Writ has any significance. While the plurality correctly states that what would have been the holding of Part III of its opinion, had that Part commanded a Court, would have directly governed only successive petitions, methinks my Brothers and Sister protest too much about their general discussion of the writ. In order to mask the fact that it fashions its factual-innocence standard from whole cloth, the plurality attempts to justify that standard by reference to the plurality's view of "the historic purpose of habeas corpus." *Ante*, at 454; see also *ante*, at 448–452. Consequently, in order to comment upon the plurality's standard for successive petitions, I find it necessary first to address the plurality's treatment of the general scope and purposes of the Great Writ. Thus, the "first six pages of the dissent" has as much "relevance" to this case as does Part II–B of the plurality's opinion. *Ante*, at 455–456, n. 18.

The plurality further chastises me for failing to propose a precise definition of the "ends of justice" standard of *Sanders* v. *United States*, 373 U. S. 1, 15 (1963), and for adhering to *Sanders* by leaving the decision whether to hear successive petitions to the "sound discretion of the federal trial judges." *Id.*, at 18. The plurality argues that *Sanders* left open "the critical question of what considerations should inform a court's decision that successive review of an issue previously decided will serve the 'ends of justice.'" *Ante*, at 455–456, n. 18. *Sanders* did leave that question open, but in a different sense than the plurality suggests. In *Sanders*, we acknowledged that the meaning of the phrase "'the ends of justice' . . . cannot be too finely particularized," 373 U. S., at 17, and, in recognition of this fact, we left it to the "sound discretion" of federal trial judges to make case-by-case determinations of what the ends of justice require. The plurality, while purporting merely to elucidate *Sanders'* "sound discretion" standard, would replace discretion with a single legal standard—actual innocence. And, while the plurality asserts that there is a need for a more refined standard, it offers no evidence that, over the 23 years since *Sanders* was decided, federal trial courts have had difficulty applying the "sound discretion" standard or have so abused their discretion with respect to successive petitions that revision of our longstanding interpretation of § 2244(b) is warranted.

At least since the middle of this century, when we decided *Waley* v. *Johnston*, 316 U. S. 101 (1942), and *Brown* v. *Allen*, 344 U. S. 443 (1953), it has been clear that "habeas lies to inquire into every constitutional defect in any criminal trial," *Mackey* v. *United States*, 401 U. S. 667, 685–686 (1971) (opinion of Harlan, J.), that has not been procedurally defaulted, with the narrow exception of Fourth Amendment exclusionary rule claims. *Stone* v. *Powell*, *supra*. As we stated just two Terms ago, there is "no doubt that in enacting § 2254, Congress sought to 'interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action.'" *Reed* v. *Ross*, 468 U. S. 1, 10 (1984) (quoting *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972)).

Contrary to the plurality's assertions, the Court has never delineated the general scope of the writ by weighing the competing interests of the prisoner and the State. Our cases addressing the propriety of federal collateral review of constitutional error made at trial or on appeal have balanced these interests solely with respect to claims that were procedurally defaulted in state court. See, *e. g.*, *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), *Engle* v. *Isaac*, 456 U. S. 107 (1982); *Murray* v. *Carrier*, *post*, p. 478. Recognizing that "the State's interest in the integrity of its rules and proceedings and the finality of its judgments . . . would be undermined if the federal courts were too free to ignore procedural forfeitures in state court," *Reed* v. *Ross*, *supra*, at 10, we held in *Wainwright* v. *Sykes*, *supra*, that a state prisoner generally must show cause and actual prejudice in order to obtain federal habeas corpus relief of a procedurally defaulted claim. See also *Engle* v. *Isaac*, *supra*. But even as we established the cause-and-prejudice standard in *Wainwright* v. *Sykes*, *supra*, we emphasized that the "rule" of *Brown* v. *Allen*, *supra*, "that the federal habeas petitioner who claims he is detained pursuant to a final judgment of a state court in violation of the United States Constitution is entitled to have the federal habeas court make its own independent determination of his federal claim . . . is in no way changed," by our adoption of special rules for procedurally defaulted claims. *Wainwright* v. *Sykes*, *supra*, at 87.[3]

Furthermore, *Stone* v. *Powell*, *supra*, on which the plurality heavily relies, did not establish a new regime for federal habeas corpus under which the prisoner's interests are weighed against the State's interests and under which he usually forfeits habeas review unless he can make out a colorable showing of factual innocence or unless the constitutional right he seeks to protect generally furthers the accuracy of factfinding at trial. Indeed, in *Stone* v. *Powell*, the Court expressly stated that its "decision . . . [was] *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally." *Id.*, at 495, n. 37 (emphasis in original). Rather, the Court simply "reaffirm[ed] that the exclusionary rule is a judicially created remedy rather than a personal constitutional right . . . and . . . emphasiz[ed] the minimal utility of the [exclusionary] rule" in the context of federal collateral proceedings. *Ibid.* Subsequent cases have uniformly construed *Stone* v. *Powell* as creating a special rule only for Fourth Amendment exclusionary rule claims and have repeatedly refused to extend its limitations on federal habeas review to any other context. *Kimmelman* v. *Morrison*, *ante*, p. 365 (declining to extend *Stone* v. *Powell* to Sixth Amendment right to effective-assistance-of-counsel claims where the principal allegation and manifestation of inadequate representation is counsel's failure to litigate adequately a Fourth Amendment claim); *Rose* v. *Mitchell*, 443 U. S. 545 (1979) (declining to extend *Stone* v. *Powell* to claims of racial discrimination in the selection of grand jury foremen); *Jackson* v. *Virginia*, 443 U. S. 307 (1979) (declining to extend *Stone* v. *Powell* to claims by state prisoners that the evidence in support of their convictions was not sufficient to permit a rational trier of fact to find guilt beyond a reasonable doubt, as required under *In re Winship*, 397 U. S. 358 (1970)).

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[3] In other words, we have recognized an exception to the exercise of federal jurisdiction in the unusual cases where respect for the procedures of state courts make this appropriate; such an exception is similar to abstention rules. See, *e. g.*, *Younger* v. *Harris*, 401 U. S. 37 (1971); *Burford* v. *Sun Oil Co.*, 319 U. S. 315 (1943). However, like other judicially created exceptions to federal jurisdiction conferred by Congress, it is a narrow exception to the "virtually unflagging obligation" to exercise that jurisdiction. *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 817 (1976).

Despite the plurality's intimations, we simply have never held that federal habeas review of properly presented, nondefaulted constitutional claims is limited either to constitutional protections that advance the accuracy of the factfinding process at trial or is available solely to prisoners who can make out a colorable showing of factual innocence. On the contrary, we have stated expressly that on habeas review "what we have to deal with is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved." *Moore* v. *Dempsey*, 261 U. S. 86, 87–88 (1923) (Holmes, J.). Congress has vested habeas jurisdiction in the federal courts over all cases in which the petitioner claims he has been detained "in violation of the Constitution or laws . . . of the United States," 28 U. S. C. § 2241(c)(3), and, "[t]he constitutional rights of criminal defendants are granted to the innocent and the guilty alike." *Kimmelman* v. *Morrison*, *ante*, at 380. Thus:

> "Even if punishment of the 'guilty' were society's highest value . . . in a constitution that [some] Members of this Court would prefer, that is not the ordering of priorities under the Constitution forged by the Framers . . . . Particular constitutional rights that do not affect the fairness of factfinding procedures cannot for that reason be denied at the trial itself. What possible justification then can there be for denying vindication of such rights on federal habeas when state courts do deny those rights

> at trial?" *Stone* v. *Powell*, 428 U. S., at 523–525 (BRENNAN, J., dissenting).

The habeas statute itself certainly does not provide any justification, either for limiting the scope of habeas review generally or for narrowly defining the ends of justice to make habeas relief available on a successive petition only to prisoners who can make a colorable showing of factual innocence.

With respect to the general scope of federal habeas review, §2241, which grants federal courts the statutory authority to issue writs of habeas corpus, makes no mention of guilt and innocence or of the need to balance the interests of the State and the prisoner. In pertinent part, it states simply that "[t]he writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. §2241(c)(3). Nor does anything in the legislative history of the habeas statute support the view that Congress intended to limit habeas review in the manner proposed by the Court. For more than 30 years, our construction of the habeas statute to permit federal collateral review of virtually all nondefaulted constitutional claims—with the narrow exception, over dissent, of Fourth Amendment claims—without reference to actual guilt or innocence or to the competing interests of the State and the prisoner, has been unmistakably clear. See *Brown* v. *Allen*, 344 U. S. 443 (1953). Several times during this period, Congress has had the Court's interpretation expressly brought to its attention through bills proposing drastic revision of federal habeas jurisdiction. See L. Yackle, Postconviction Remedies §19, pp. 91–92 (1981) (describing relevant bills introduced in past several Congresses). Each of those times, Congress steadfastly refused to make any significant changes in this Court's construction of that jurisdiction. *Id.*, §19, at 92 ("[S]ince 1948 the only amendments to the [habeas] statutes that the Congress has approved have . . . simply tracked contemporaneous Supreme Court decisions") (footnote omitted). The fact that

Congress has been made aware of our longstanding construction and has chosen to leave it undisturbed, "lends powerful support to [its] continued viability." *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U. S. 409, 419 (1986).

With regard to the specific question whether factual innocence is a precondition for review of a successive habeas petition, neither § 2244(b)—which governs applications for writs of habeas corpus to state courts that are filed subsequent to the disposition of a prior federal habeas petition, its legislative history, nor the Rules Governing Section 2254 Cases in the United States District Courts (hereafter Rules Governing Section 2254), support the plurality's position. Section 2244(b), as amended in 1966, states in relevant part that a subsequent petition "*need not be entertained* . . . unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court . . . is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ." (Emphasis added.) By its very terms, then, § 2244(b) merely informs district courts that they *need not* consider successive petitions; that is, the statute gives district courts the *discretion* not to hear such petitions. Similarly, Rule 9(b) of the Rules Governing Section 2254, which were adopted in 1976, states that a "second or successive petition *may* be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." (Emphasis added.)

Congress clearly intended that courts continue to determine which successive petitions they may choose not to hear by reference to the *Sanders* ends-of-justice standard. First, nothing in the House or Senate Reports accompanying the bill that amended § 2244 in 1966 suggests that Congress wished to abandon the *Sanders* standard. See H. R. Rep. No. 1892, 89th Cong., 2d Sess. (1966); S. Rep. No. 1797, 89th Cong., 2d Sess. (1966). Second, the legislative history of the Rules Governing Section 2254 demonstrates that in adopting Rule 9(b) Congress expressly endorsed the existing case law governing subsequent petitions and cited *Sanders*.[4] H. R. Rep. No. 94–1471, pp. 5–6 (1976). Third, the Advisory Committee's Notes relating to Rule 9(b) state that *Sanders* provides the relevant standards for subsequent petitions and indicate that the district courts have the discretion to refuse to entertain vexatious and meritless subsequent petitions:

> "In *Sanders* v. *United States*, 373 U. S. 1 (1963), the court, in dealing with the problem of successive applications, stated:
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> "'Controlling weight *may* be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.' [Emphasis added]."
>
> . . . . .
>
> "*Sanders*, [28] U. S. C. § 2244, and [Rule 9(b)] make it clear that the court has the discretion to entertain a successive application.
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> . . . . .
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> "Subdivision (b) is consistent with the important and well established purpose of habeas corpus. It does not

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[4] While the discussion in the House Report regarding Rule 9(b) focuses on that portion of the Rule that governs abuse of the writ, rather than petitions that repeatedly allege the same claims, it is clear that the Committee intended Rule 9(b) to conform in its entirety to existing case law, particularly to *Sanders* v. *United States*. See H. R. Rep. No. 94–1471, pp. 5–6 (1976).

> eliminate a remedy to which the petitioner is rightfully entitled. However, in *Sanders*, the court pointed out:
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> "'Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.' 373 U. S. at 18.
>
> ". . . In rare instances, the court may feel a need to entertain a petition alleging grounds that have already been decided on the merits. *Sanders*, 373 U. S. at 1, 16. However, abusive use of the writ should be discouraged, and instances of abuse are frequent enough to require a means of dealing with them. For example, a successive application, already decided on the merits, may be submitted in the hope of getting before a different judge in multijudge courts. . . . This subdivision is aimed at screening out the abusive petitions . . . so that the more meritorious petitions can get quicker and fuller consideration." 28 U. S. C., p. 358.

The Advisory Committee gave no indication that the problem Rule 9(b), or § 2244(b), seeks to correct is that of a *guilty* prisoner seeking repeated federal review of the same constitutional claim. Rather, it is apparent that the Rule attempts to remedy only the problem posed by vexatious and meritless subsequent petitions. The Committee explicitly contemplated, though, that nonabusive, "meritorious [subsequent] petitions" would receive "ful[l] consideration." *Ibid.*

When we review habeas cases, our task is "to give fair effect to the habeas corpus jurisdiction enacted by Congress." *Brown* v. *Allen*, 344 U. S., at 500 (opinion of Frankfurter, J.). With respect to successive habeas petitions, giving "fair effect" to the intent of Congress is to construe "the ends of justice" as *Sanders* did—to mean that it is within the sound discretion of the court *to refuse to hear* abusive, meritless petitions and *to hear* petitions in which the prisoner advances a potentially meritorious claim and provides a good justification for returning to court a second time with the same claim.[5]

In the instant case, respondent alleged a potentially meritorious Sixth Amendment claim. He also advanced a complete justification for returning to federal court a second time with this claim. Between his first and second federal habeas petitions, this Court decided *United States* v. *Henry*, 447 U. S. 264 (1980), a case in which the facts were substantially similar to the facts of respondent's case[6] and in which we elaborated on the Sixth Amendment's prohibition against government interference with an accused's right to counsel, a prohibition that we had previously recognized in *Massiah* v. *United States*, 377 U. S. 201 (1964), and *Brewer* v. *Williams*, 430 U. S. 387 (1977). The intervention of *Henry*, *supra*, clarified the appropriate analysis for Sixth Amendment claims like respondent's; thus the Court of Appeals did not abuse its discretion by granting reconsideration of respondent's constitutional claim under the dispositive legal standard.[7]

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[5] I agree with the plurality that actual innocence constitutes a sufficient justification for returning to court a second time with the same claim. I do not agree, though, that a prisoner's inability to make a showing of actual innocence negates an otherwise good justification, such as respondent's.

[6] The facts of this case demonstrate the arbitrariness of the Court's rule. The initial federal habeas petitions filed by respondent and by Henry presented virtually identical claims. Because our decision in *United States* v. *Henry* ma[illegible]ve altered the law of the Circuit in which respondent's prior petition failed, it is only just that respondent's claim be reviewed under the proper constitutional standards.

[7] The plurality's factual-innocence standard also presents some significant institutional problems. First, this standard requires the federal courts to function in much the same capacity as the state trier of fact—the federal courts must make a rough decision on the question of guilt or innocence. This requirement diverts the federal courts from the central purpose of habeas review—the evaluation of claims that convictions were obtained in violation of the Constitution. Second, it is unclear what relevance the plurality's standard would have in a case in which a prisoner alleges constitutional error in the sentencing phase of a capital case. Guilt

II

The Court holds that the Court of Appeals erred with respect to the merits of respondent's habeas petition. According to the Court, the Court of Appeals failed to accord § 2254(d)'s presumption of correctness to the state trial court's findings that respondent's cellmate, Lee, "at no time asked any questions" of respondent concerning the pending charges, and that Lee only listened to respondent's "spontaneous" and "unsolicited" statements, App. 62–63. As a result, the Court concludes, the Court of Appeals failed to recognize that this case presents the question, reserved in *Henry*, *supra*, whether the Sixth Amendment forbids the admission into evidence of an accused's statements to a jailhouse informant who was "placed in close proximity but [made] no effort to stimulate conversations about the crime charged." *Id.*, at 271, n. 9. I disagree with the Court's characterization of the Court of Appeals' treatment of the state court's findings and, consequently, I disagree with the Court that the instant case presents the "listening post" question.

The state trial court simply found that Lee did not ask respondent any direct questions about the crime for which respondent was incarcerated. App. 62–63. The trial court considered the significance of this fact only under state precedents, which the court interpreted to require affirmative "interrogation" by the informant as a prerequisite to a constitutional violation. *Id.*, at 63. The court did not indicate whether it referred to a Fifth Amendment or to a Sixth Amendment violation in identifying "interrogation" as a precondition to a violation; it merely stated that "the utterances made by [respondent] to Lee were unsolicited, and volun-

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or innocence is irrelevant in that context; rather, there is only a decision made by representatives of the community whether the prisoner shall live or die. Presumably, then, the plurality's test would not be applicable to such claims.

tarily made and did not violate the defendant's Constitutional rights." *Ibid.*

The Court of Appeals did not disregard the state court's finding that Lee asked respondent no direct questions regarding the crime. Rather, the Court of Appeals *expressly accepted* that finding, *Wilson* v. *Henderson*, 742 F. 2d 741, 745 (CA2 1984) ("[e]ven accepting that Lee did not ask Wilson any direct questions . . ."), but concluded that, as a matter of law, the deliberate elicitation standard of *Henry*, *supra*, and *Massiah*, *supra*, encompasses other, more subtle forms of stimulating incriminating admissions than overt questioning. The court suggested that the police deliberately placed respondent in a cell that overlooked the scene of the crime, hoping that the view would trigger an inculpatory comment to respondent's cellmate.[8] The court also observed that, while Lee asked respondent no questions, Lee nonetheless stimulated conversation concerning respondents' role in the Star Taxicab Garage robbery and murder by remarking that respondent's exculpatory story did not "'sound too good'" and that he had better come up with a better one. 742 F. 2d, at 745. Thus, the Court of Appeals concluded that respondent's case did not present the situation reserved in *Henry*, where an accused makes an incriminating remark within the hearing of a jailhouse informant, who "makes no effort to stimulate conversations about the crime charged." 447 U. S., at 271, n. 9. Instead, the court determined this case to be virtually indistinguishable from *Henry*.

The Sixth Amendment guarantees an accused, at least after the initiation of formal charges, the right to rely on counsel as the "medium" between himself and the State. *Maine* v. *Moulton*, 474 U. S. 159, 176 (1985). Accordingly, the Sixth Amendment "imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek [the assistance of counsel]," *id.*, at 171, and therefore "[t]he determination whether particular action by state agents violates the accused's right to . . . counsel must be made in light of this obligation." *Id.*, at 176. To be sure, the Sixth Amendment is not violated whenever, "by luck or happenstance," the State obtains incriminating statements from the accused after the right to counsel has attached. It is violated, however, when "the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Ibid.* (footnote omitted). As we explained in *Henry*, where the accused has not waived his right to counsel, the government knowingly circumvents the defendant's right to counsel where it "deliberately elicit[s]" inculpatory admissions, 447 U. S., at 270, that is, "intentionally creat[es] a situation likely to induce [the accused] to make incriminating statements without the assistance of counsel." *Id.*, at 274.

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[8] The Court of Appeals noted that "[a]s soon as Wilson arrived and viewed the garage, he became upset and stated that 'someone's messing with me.'" 742 F. 2d, at 745.

In *Henry*, we found that the Federal Government had "deliberately elicited" incriminating statements from Henry based on the following circumstances. The jailhouse informant, Nichols, had apparently followed instructions to obtain information without directly questioning Henry and without initiating conversations concerning the charges pending against Henry. We rejected the Government's argument that because Henry initiated the discussion of his crime, no Sixth Amendment violation had occurred. We pointed out that under *Massiah* v. *United States*, 377 U. S. 201 (1964), it is irrelevant whether the informant asks pointed questions about the crime or "merely engage[s] in general conversation about it." 447 U. S., at 271–272, and n. 10. Nichols, we noted, "was not a passive listener; . . . he had 'some conversations with Mr. Henry' while he was in jail and Henry's incriminatory statements were 'the product of this conversation.'" *Id.*, at 271.

In deciding that Nichols' role in these conversations amounted to deliberate elicitation, we also found three other factors important. First, Nichols was to be paid for any information he produced and thus had an incentive to extract inculpatory admissions from Henry. *Id.*, at 270. Second, Henry was not aware that Nichols was acting as an informant. *Ibid.* "Conversation stimulated in such circumstances," we observed, "may elicit information that an accused would not intentionally reveal to persons known to be Government agents." *Id.*, at 273. Third, Henry was in custody at the time he spoke with Nichols. This last fact is significant, we stated, because "custody imposes pressures on the accused [and] confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents." *Id.*, at 274. We concluded that by "intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." *Ibid.* (footnote omitted).

In the instant case, as in *Henry*, the accused was incarcerated and therefore was "susceptible to the ploys of undercover Government agents." *Ibid.* Like Nichols, Lee was a secret informant, usually received consideration for the services he rendered the police, and therefore had an incentive to produce the information which he knew the police hoped to obtain. Just as Nichols had done, Lee obeyed instructions not to question respondent and to report to the police any statements made by the respondent in Lee's presence about the crime in question. App. 62. And, like Nichols, Lee encouraged respondent to talk about his crime by conversing with him on the subject over the course of several days and by telling respondent that his exculpatory story would not convince anyone without more work. However, unlike the situation in *Henry*, a disturbing visit from respondent's brother, rather than a conversation with the informant, seems to have been the immediate catalyst for respondent's confession to Lee. *Ante*, at 440; *Wilson* v. *Henderson*, 82 Civ. 4397 (SDNY, Mar. 30, 1983), App. to Pet. for Cert. 25a–26a. While it might appear from this sequence of events that Lee's comment regarding respondent's story and his general willingness to converse with respondent about the crime were not the *immediate* causes of respondent's admission, I think that the deliberate-elicitation standard requires consideration of the entire course of government behavior.

The State intentionally created a situation in which it was forseeable that respondent would make incriminating statements without the assistance of counsel, *Henry*, 447 U. S., at 274—it assigned respondent to a cell overlooking the scene of the crime and designated a secret informant to be respondent's cellmate. The informant, while avoiding direct questions, nonetheless developed a relationship of cellmate camaraderie with respondent and encouraged him to talk about his crime. While the *coup de grace* was delivered by respondent's brother, the groundwork for respondent's confession was laid by the State. Clearly the State's actions had a sufficient nexus with respondent's admission of guilt to constitute deliberate elicitation within the meaning of *Henry*. I would affirm the judgment of the Court of Appeals.

JUSTICE STEVENS, dissenting.

When a district court is confronted with the question whether the "ends of justice" would be served by entertaining a state prisoner's petition for habeas corpus raising a claim that has been rejected on a prior federal petition for the same relief, one of the facts that may properly be considered is whether the petitioner has advanced a "colorable claim of innocence." But I agree with JUSTICE BRENNAN that this is not an essential element of every just disposition of a successive petition. More specifically, I believe that the District Court did not abuse its discretion in entertaining the petition in this case, although I would also conclude that this is one of those close cases in which the District Court could have properly decided that a second review of the same contention was not required despite the intervening decision in *United States* v. *Henry*, 447 U. S. 264 (1980).

On the merits, I agree with the analysis in Part II of JUSTICE BRENNAN's dissent. Accordingly, I also would affirm the judgment of the Court of Appeals.

MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS *v.* CARRIER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-1554. Argued January 21, 1986—Decided June 26, 1986

Respondent was convicted by a jury in a Virginia state court of rape and abduction. The trial judge denied respondent's counsel's pretrial motion to discover the victim's statements to police describing her assailants, their vehicle, and the location of the alleged rape. Without consulting respondent, counsel filed a petition for appeal that failed to include any claim that the trial judge erred in not permitting counsel to examine the victim's statements, notwithstanding a Virginia Supreme Court Rule providing that only errors assigned in the petition for appeal will be noticed and that no error not so assigned will be admitted as a ground for reversal. The Virginia Supreme Court refused the appeal, and this Court denied certiorari. Thereafter, respondent filed a *pro se* state habeas corpus petition, claiming that he had been denied due process of law by the prosecution's withholding of the victim's statements. The state court denied the petition on the ground that the claim was barred because respondent failed to raise it on appeal, and the Virginia Supreme Court denied certiorari. Respondent then filed a *pro se* habeas petition in Federal District Court, which also held that the discovery claim was barred by procedural default. On appeal, respondent disavowed any claim of ineffective assistance of counsel, but asserted that counsel had mistakenly omitted his discovery claim from the state petition for appeal and that this error was cause for his default. The Court of Appeals reversed, holding that a federal habeas petitioner need only satisfy the district court that the procedural default resulted from his attorney's ignorance or inadvertence, rather than from a deliberate tactical decision. Accordingly, the Court of Appeals remanded to the District Court to resolve the question of respondent's counsel's motivation for failing to appeal the discovery claim.

Held: A federal habeas petitioner, such as respondent, cannot show cause for a procedural default by establishing that competent defense counsel's failure to raise a substantive claim of error was inadvertent rather than deliberate. Pp. 485–497.

(a) The mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default. *Engle* v. *Isaac*, 456 U. S.

107. The question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made. So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland* v. *Washington*, 466 U. S. 668, there is no inequity in requiring him to bear the risk of attorney error that results in a procedural default. Instead, the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. While ineffective assistance of counsel constitutes cause for a procedural default, the exhaustion doctrine generally requires that an ineffective assistance claim be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default in federal habeas proceedings. Pp. 485–490.

(b) There is no merit to respondent's argument that even if counsel's ignorance or inadvertence does not constitute cause for a procedural default at trial, it does constitute cause for a procedural default on appeal. A State's procedural rules serve vital purposes on appeal as well as at trial and on state collateral attack, and the standard for cause should not vary depending on the timing of a procedural default. The frustration of the State's interests that occurs when an appellate procedural rule is broken is not significantly diminished when counsel's breach results from ignorance or inadvertence rather than from a deliberate decision, tactical or not, to abstain from raising the claim. Failure to raise a claim on appeal reduces the finality of appellate proceedings, deprives the appellate court of an opportunity to review trial error, and undercuts the State's ability to enforce its procedural rules. As with procedural defaults at trial, these costs are imposed on the State regardless of the kind of attorney error that led to the procedural default. Whatever may be the case where counsel has failed to take an appeal at all, counsel's failure to raise a *particular* claim on appeal is to be scrutinized under the cause and prejudice standard when that failure is treated as a procedural default by the state courts. Attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default even when that default occurs on appeal rather than at trial. To the contrary, cause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim. Pp. 490–492.

(c) Adherence to the cause and prejudice test in the conjunctive will not prevent federal habeas corpus courts from ensuring the fundamental fairness that is the central concern of the writ of habeas corpus. That test is a sound and workable means of channeling the discretion of federal habeas courts. However, in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default. Pp. 492–497.

(d) Respondent has never alleged any external impediment that might have prevented counsel from raising his discovery claim in his state petition for review, and has disavowed any claim that counsel's performance on appeal was so deficient as to make out an ineffective assistance claim. Accordingly, respondent's petition for federal habeas review of his procedurally defaulted discovery claim must be dismissed for failure to establish cause for the default, unless it is determined on remand that the victim's statements contain material that would establish respondent's actual innocence. P. 497.

754 F. 2d 520, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined, *post*, p. 497. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 516.

Jerry P. Slonaker, Senior Assistant Attorney General of Virginia, argued the cause for petitioner. With him on the briefs were *William G. Broaddus*, Attorney General, and *Donald R. Curry*, Assistant Attorney General.

Deputy Solicitor General Frey argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Fried*, *Assistant Attorney General Trott*, *Edwin S. Kneedler*, and *Kathleen A. Felton*.

Sherman L. Cohn, by appointment of the Court, 474 U. S. 898, argued the cause for respondent. With him on the brief was *Steven H. Goldblatt*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Idaho et al. by *James Thomas Jones*, Attorney General of Idaho, and *Lynn E. Thomas*, Solicitor General, *Charles A. Graddick*, Attorney General of Alabama, *Harold M. Brown*, Attorney General of Alaska, *Robert K. Corbin*, Attorney General of Arizona, *John Steven Clark*, Attorney General of Arkansas, *Duane Woodward*, Attorney General of Colorado, *John J. Kelley*, Chief State's Attorney of Connecticut, *Charles M. Oberly*, JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certiorari in this case to consider whether a federal habeas petitioner can show cause for a procedural default by establishing that competent defense counsel inad-

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Attorney General of Delaware, *Michael J. Bowers*, Attorney General of Georgia, *Richard Opper*, Attorney General of Guam, *Corinne K. A. Watanabe*, Attorney General of Hawaii, *Neil F. Hartigan*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Robert T. Stephan*, Attorney General of Kansas, *David L. Armstrong*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, *Stephen H. Sachs*, Attorney General of Maryland, *Francis X. Bellotti*, Attorney General of Massachusetts, *Frank J. Kelley*, Attorney General of Michigan, *Edwin L. Pittman*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Mike Greely*, Attorney General of Montana, *Robert M. Spire*, Attorney General of Nebraska, *Brian McKay*, Attorney General of Nevada, *Stephen E. Merrill*, Attorney General of New Hampshire, *Irwin I. Kimmelman*, Attorney General of New Jersey, *Paul Bardacke*, Attorney General of New Mexico, *Lacy H. Thornburg*, Attorney General of North Carolina, *Nicholas Spaeth*, Attorney General of North Dakota, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Michael Turpen*, Attorney General of Oklahoma, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *Hector Rivera Cruz*, Attorney General of Puerto Rico, *Arlene Violet*, Attorney General of Rhode Island, *T. Travis Medlock*, Attorney General of South Carolina, *Mark V. Meierhenry*, Attorney General of South Dakota, *W. J. Michael Cody*, Attorney General of Tennessee, *Jim Mattox*, Attorney General of Texas, *David L. Wilkinson*, Attorney General of Utah, *Jeffrey Amestoy*, Attorney General of Vermont, *Victor D. Schneider*, Acting Attorney General of The Virgin Islands, *William G. Broaddus*, Attorney General of Virginia, *Kenneth O. Eikenberry*, Attorney General of Washington, *Charlie Brown*, Attorney General of West Virginia, *Bronson C. La Follette*, Attorney General of Wisconsin, and *Archie G. McClintock*, Attorney General of Wyoming; for the State of Florida by *Jim Smith*, Attorney General, and *Raymond L. Marky* and *Gregory G. Costas*, Assistant Attorneys General; and for the Legal Foundation of America et al. by *Susan Crump, David Crump*, and *James P. Manak*.

Larry W. Yackle, Charles S. Sims, and *Burt Neuborne* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

vertently failed to raise the substantive claim of error rather than deliberately withholding it for tactical reasons.

I

Respondent Clifford Carrier was convicted of rape and abduction by a Virginia jury in 1977. Before trial, respondent's court-appointed counsel moved for discovery of the victim's statements to police describing "her assailants, the vehicle the assailants were driving, and the location of where the alleged rape took place." 2 Record 11. The presiding judge denied the motion by letter to counsel after examining the statements *in camera* and determining that they contained no exculpatory evidence. *Id.*, at 31. Respondent's counsel made a second motion to discover the victim's statements immediately prior to trial, which the trial judge denied for the same reason after conducting his own *in camera* examination. Tr. 151–152.

After respondent was convicted, his counsel filed a notice of appeal to the Virginia Supreme Court assigning seven errors, of which the fifth was:

> "Did the trial judge err by not permitting defendant's counsel to examine the written statements of the victim prior to trial, and during the course of the trial?" 2 Record 83.

Without consulting respondent, counsel subsequently submitted the required petition for appeal but failed to include this claim, notwithstanding that Virginia Supreme Court Rule 5:21 provides that "[o]nly errors assigned in the petition for appeal will be noticed by this Court and no error not so assigned will be admitted as a ground for reversal of a decision below." The Virginia Supreme Court refused the appeal and this Court denied certiorari. *Carrier* v. *Virginia*, 439 U. S. 1076 (1979).

A year later respondent, by this time proceeding *pro se*, filed a state habeas corpus petition claiming that he had been denied due process of law by the prosecution's withholding of the victim's statements. The State sought dismissal of his petition on the ground that respondent was barred from presenting his due process discovery claim on collateral review because he failed to raise that claim on appeal. The state habeas court dismissed the petition "for the reasons stated in the Motion to Dismiss," 1 Record, Doc. No. 12, and the Virginia Supreme Court denied certiorari.

Respondent next filed a *pro se* habeas petition in the District Court for the Eastern District of Virginia, renewing his due process discovery claim as grounds for relief. The State filed a motion to dismiss asserting that respondent's failure to raise the issue on direct appeal was a procedural default barring federal habeas review under *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), and that respondent had not exhausted his state remedies because he could bring an ineffective assistance of counsel claim in the state courts to establish that his procedural default should be excused. 1 Record, Doc. No. 3. The United States Magistrate to whom the case was referred recommended dismissal by virtue of the procedural default and also ruled that respondent had not exhausted his state remedies. In reply to the Magistrate's report, respondent alleged that his procedural default was "due to ineffective assistance of counsel during the filing of his appeal." App. 11. The District Court approved the Magistrate's report, holding the discovery claim barred by the procedural default and indicating that respondent should establish cause for that default in the state courts.

At oral argument on appeal to the Court of Appeals for the Fourth Circuit, respondent abandoned any claim of ineffective assistance of counsel but asserted that counsel had mistakenly omitted his discovery claim from the petition for appeal and that this error was cause for his default. A divided panel of the Court of Appeals reversed and remanded. *Carrier* v. *Hutto*, 724 F. 2d 396 (1983). The court construed respondent's objection to the denial of discovery as having rested throughout on a contention that *Brady* v. *Maryland*, 373 U. S. 83 (1963), requires the prosecution to disclose any evidence that might be material to guilt whether or not it is exculpatory, and concluded that when respondent's counsel omitted this discovery claim from the petition for review "the issue was lost for purposes of direct and collateral review." 724 F. 2d, at 399. The court framed the issue before it as whether "a single act or omission by counsel, insufficient by itself to contravene the sixth amendment, [can] satisfy the 'cause' prong of the exception to preclusive procedural default discussed in *Wainwright?*" *Id.*, at 400. In answering this question, the court drew a dispositive distinction between procedural defaults resulting from deliberate tactical decisions and those resulting from ignorance or inadvertence. *Id.*, at 401. The court determined that only in the latter category does an attorney's error constitute cause because, whereas a tactical decision implies that counsel has, at worst, "reasonably but incorrectly exercise[d] her judgment," ignorance or oversight implies that counsel "fail[ed] to exercise it at all, in dereliction of the duty to represent her client." *Ibid.* Thus, in order to establish cause a federal habeas petitioner need only satisfy the district court "that the failure to object or to appeal his claim was the product of his attorney's ignorance or oversight, not a deliberate tactic." *Ibid.* Accordingly, the Court of Appeals remanded to the District Court:

> "[A]lthough the likelihood of attorney error appears very great in this case, we lack testimony from Carrier's counsel which might disclose a strategic reason for failing to appeal the *Brady* issue. The question of counsel's motivation is one of fact for the district court to resolve upon taking further evidence." *Id.*, at 402.

The court also ruled that the District Court erred in suggesting that respondent should establish cause for the default in the state courts. "The exhaustion requirement of 28 U. S. C. § 2254 pertains to independent claims for habeas relief, not to the proffer of *Wainwright* cause and prejudice." *Ibid.* Since respondent did not allege ineffective assistance of counsel as an independent basis for habeas relief, the case presented no exhaustion question.

The dissenting judge believed that the petition should have been dismissed for failure to exhaust state remedies because respondent had never presented his discovery claim as a denial of due process in the state courts, *id.*, at 403–404 (Hall, J., dissenting), and differed with the majority's interpretation of the cause standard because "[it] will ultimately allow the exception to swallow the rule." *Id.*, at 405. The State sought rehearing, and the en banc Court of Appeals adopted the panel majority's decision, with four judges dissenting. *Carrier* v. *Hutto*, 754 F. 2d 520 (1985). We now reverse and remand.

II

Wainwright v. *Sykes* held that a federal habeas petitioner who has failed to comply with a State's contemporaneous-objection rule at trial must show cause for the procedural default and prejudice attributable thereto in order to obtain review of his defaulted constitutional claim. 433 U. S., at 87. See also *Francis* v. *Henderson*, 425 U. S. 536 (1976). In so holding, the Court explicitly rejected the standard described in *Fay* v. *Noia*, 372 U. S. 391 (1963), under which a federal habeas court could refuse to review a defaulted claim only if "an applicant ha[d] deliberately by-passed the orderly procedure of the state courts," *id.*, at 438, by personal waiver of the claim amounting to "'an intentional relinquishment or abandonment of a known right or privilege.'" *Id.*, at 439 (quoting *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938)). See *Wainwright* v. *Sykes*, 433 U. S., at 87–88. At a minimum, then, *Wainwright* v. *Sykes* plainly implied that default of a constitutional claim by counsel pursuant to a trial strategy or tactical decision would, absent extraordinary circumstances, bind the habeas petitioner even if he had not personally waived that claim. See *id.*, at 91, n. 14; *Reed* v. *Ross*, 468 U. S. 1, 13 (1984). Beyond that, the Court left open "for resolution in future decisions the precise definition of the 'cause'-and-'prejudice' standard." 433 U. S., at 87.

We revisited the cause and prejudice test in *Engle* v. *Isaac*, 456 U. S. 107 (1982). Like *Wainwright* v. *Sykes*, *Engle* involved claims that were procedurally defaulted at trial. In seeking to establish cause for their defaults, the prisoners argued that "they could not have known at the time of their trials" of the substantive basis for their constitutional claims, which were premised on *In re Winship*, 397 U. S. 358 (1970). *Engle*, 456 U. S., at 130. Without deciding "whether the novelty of a constitutional claim ever establishes cause for a failure to object," *id.*, at 131, we rejected this contention because we could not conclude that the legal basis for framing the prisoners' constitutional claims was unavailable at the time. *Id.*, at 133. In language that bears directly on the present case, we said:

> "We do not suggest that every astute counsel would have relied upon *Winship* to assert the unconstitutionality of a rule saddling criminal defendants with the burden of proving an affirmative defense. Every trial presents a myriad of possible claims. Counsel might have overlooked or chosen to omit respondents' due process argument while pursuing other avenues of defense. We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as a cause for a procedural default." *Id.*, at 133–134 (footnote omitted).

The thrust of this part of our decision in *Engle* is unmistakable: the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default. At least with respect to defaults that occur at trial, the Court of Appeals' holding that ignorant or inadvertent attorney error is cause for any resulting procedural default is plainly inconsistent with *Engle*. It is no less inconsistent with the purposes served by the cause and prejudice standard. That standard rests not only on the need to deter intentional defaults but on a judgment that the costs of federal habeas review "are particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts." *Engle*, 456 U. S., at 128. Those costs, which include a reduction in the finality of litigation and the frustration of "both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," *ibid.*, are heightened in several respects when a trial default occurs: the default deprives the trial court of an opportunity to correct any error without retrial, detracts from the importance of the trial itself, gives state appellate courts no chance to review trial errors, and "exacts an extra charge by undercutting the State's ability to enforce its procedural rules." *Id.*, at 129. Clearly, these considerable costs do not disappear when the default stems from counsel's ignorance or inadvertence rather than from a deliberate decision, for whatever reason, to withhold a claim.

Indeed, the rule applied by the Court of Appeals would significantly increase the costs associated with a procedural default in many cases. In order to determine whether there was cause for a procedural default, federal habeas courts would routinely be required to hold evidentiary hearings to determine what prompted counsel's failure to raise the claim in question. While the federal habeas courts would no doubt strive to minimize the burdens to all concerned through the use of affidavits or other simplifying procedures, we are not prepared to assume that these costs would be negligible, particularly since, as we observed in *Strickland* v. *Washington*, 466 U. S. 668, 690 (1984), "[i]ntensive scrutiny of counsel . . . could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." Nor will it always be easy to classify counsel's behavior in accordance with the deceptively simple categories propounded by the Court of Appeals. Does counsel act out of "ignorance," for example, by failing to raise a claim for tactical reasons after mistakenly assessing its strength on the basis of an incomplete acquaintance with the relevant precedent? The uncertain dimensions of any exception for "inadvertence" or "ignorance" furnish an additional reason for rejecting it.

We think, then, that the question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made. So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland* v. *Washington*, *supra*, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default. Instead, we think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel, see *Reed* v. *Ross*, 468 U. S., at 16, or that "some interference by officials," *Brown* v. *Allen*, 344 U. S. 443, 486 (1953), made compliance impracticable, would constitute cause under this standard.

Similarly, if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not "conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance." *Cuyler* v. *Sullivan*, 446 U. S. 335, 344 (1980). Ineffective assistance of counsel, then, is cause for a procedural default. However, we think that the exhaustion doctrine, which is "principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings," *Rose* v. *Lundy*, 455 U. S. 509, 518 (1982), generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default. The question whether there is cause for a procedural default does not pose any occasion for applying the exhaustion doctrine when the federal habeas court can adjudicate the question of cause—a question of federal law—without deciding an independent and unexhausted constitutional claim on the merits. But if a petitioner could raise his ineffective assistance claim for the first time on federal habeas in order to show cause for a procedural default, the federal habeas court would find itself in the anomalous position of adjudicating an unexhausted constitutional claim for which state court review might still be available. The principle of comity that underlies the exhaustion doctrine would be ill served by a rule that allowed a federal district court "to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," *Darr* v. *Burford*, 339 U. S. 200, 204 (1950), and that holds true whether an ineffective assistance claim is asserted as cause for a procedural default or denominated as an independent ground for habeas relief.

It is clear that respondent failed to show or even allege cause for his procedural default under this standard for cause, which *Engle* squarely supports. Respondent argues nevertheless that his case is not controlled by *Engle* because it involves a procedural default on appeal rather than at trial. Respondent does not dispute, however, that the cause and prejudice test applies to procedural defaults on appeal, as we plainly indicated in *Reed* v. *Ross*, 468 U. S., at 11. *Reed*, which involved a claim that was defaulted *on appeal*, held that a habeas petitioner could establish cause for a procedural default if his claim is "so novel that its legal basis is not reasonably available to counsel," *id.*, at 16. That holding would have been entirely unnecessary to the disposition of the prisoner's claim if the cause and prejudice test were inapplicable to procedural defaults on appeal.

The distinction respondent would have us draw must therefore be made, if at all, in terms of the content of the cause requirement as applied to procedural defaults on appeal. Accordingly, respondent asks us to affirm the Court of Appeals' judgment on the narrow ground that even if counsel's ignorance or inadvertence does not constitute cause for a procedural default at trial, it does constitute cause for a procedural default on appeal. In support of this distinction, respondent asserts that the concerns that underlie the cause and prejudice test are not present in the case of defaults on appeal. A default on appeal, he maintains, does not detract from the significance of the trial or from the development of a full trial record, or deprive the trial court of an opportunity to correct error without the need for retrial. Moreover, unlike the rapid pace of trial, in which it is a matter of necessity that counsel's decisions bind the defendant, "the appellate process affords the attorney time for reflection, research, and full consultation with his client." Brief for Respondent 19. Finally, respondent suggests that there is no likelihood that an attorney will preserve an objection at trial yet choose to withhold it on appeal in order to "sandbag" the prosecution by raising the claim on federal habeas if relief is denied by the state courts.

These arguments are unpersuasive. A State's procedural rules serve vital purposes at trial, on appeal, and on state collateral attack. The important role of appellate procedural rules is aptly captured by the Court's description in *Reed* v. *Ross* of the purposes served by the procedural rule at issue there, which required the defendant initially to raise his legal claims on appeal rather than on postconviction review:

> "It affords the state courts the opportunity to resolve the issue shortly after trial, while evidence is still avail-

> able both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal. See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 147 (1970). This type of rule promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case." 468 U. S., at 10–11.

These legitimate state interests, which are manifestly furthered by the comparable procedural rule at issue in this case, warrant our adherence to the conclusion to which they led the Court in *Reed* v. *Ross*—that the cause and prejudice test applies to defaults on appeal as to those at trial.

We likewise believe that the standard for cause should not vary depending on the timing of a procedural default or on the strength of an uncertain and difficult assessment of the relative magnitude of the benefits attributable to the state procedural rules that attach at each successive stage of the judicial process. "Each State's complement of procedural rules . . . channel[s], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Id.*, at 10. It is apparent that the frustration of the State's interests that occurs when an appellate procedural rule is broken is not significantly diminished when counsel's breach results from ignorance or inadvertence rather than a deliberate decision, tactical or not, to abstain from raising the claim. Failure to raise a claim on appeal reduces the finality of appellate proceedings, deprives the appellate court of an opportunity to review trial error, and "undercut[s] the State's ability to enforce its procedural rules." *Engle*, 456 U. S., at 129. As with procedural defaults at trial, these costs are imposed on the State regardless of the kind of attorney error that led to the procedural default. Nor do we agree that the possibility of "sandbagging" vanishes once a trial has ended in conviction, since appellate counsel might well conclude that the best strategy is to select a few promising claims for airing on appeal, while reserving others for federal habeas review should the appeal be unsuccessful. Moreover, we see little reason why counsel's failure to detect a colorable constitutional claim should be treated differently from a deliberate but equally prejudicial failure by counsel to raise such a claim. The fact that the latter error can be characterized as a misjudgment, while the former is more easily described as an oversight, is much too tenuous a distinction to justify a regime of evidentiary hearings into counsel's state of mind in failing to raise a claim on appeal.

The real thrust of respondent's arguments appears to be that on appeal it is inappropriate to hold defendants to the errors of their attorneys. Were we to accept that proposition, defaults on appeal would presumably be governed by a rule equivalent to *Fay* v. *Noia*'s "deliberate bypass" standard, under which only personal waiver by the defendant would require enforcement of a procedural default. We express no opinion as to whether counsel's decision not to take an appeal at all might require treatment under such a standard, see *Wainwright* v. *Sykes*, 433 U. S., at 88, n. 12, but, for the reasons already given, we hold that counsel's failure to raise a *particular* claim on appeal is to be scrutinized under the cause and prejudice standard when that failure is treated as a procedural default by the state courts. Attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default even when that default occurs on appeal rather than at trial. To the contrary, cause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim.

III

Concurring in the judgment, JUSTICE STEVENS contends that our decision today erects an unwarranted procedural barrier to the correction through federal habeas corpus of violations of fundamental constitutional rights that have resulted in a miscarriage of justice. The cause and prejudice test, in his view, "must be considered within an overall inquiry into justice," *post*, at 504, which requires consideration in every case of the character of the constitutional claim. If the federal right asserted is of "fundamental importance," *post*, at 499, or if a violation of that right "calls into question the accuracy of the determination of . . . guilt," *ibid.*, JUSTICE STEVENS would then balance "the nature and strength of the constitutional claim" and "the nature and strength of the state procedural rule that has not been observed." *Post*, at 506.

At the outset, it should be noted that this balancing is more apparent than real, for the concurrence makes plain that the controlling consideration must be whether the petitioner was denied "'fundamental fairness in the state-court proceedings.'" *Post*, at 506, n. 13 (quoting *Rose* v. *Lundy*, 455 U. S. 509, 547, n. 17 (1982) (STEVENS, J., dissenting)). And, while JUSTICE STEVENS argues at some length that an appellate default should be given less weight than a trial default in applying the balancing process he proposes, it is hard to believe that this distinction would make any difference given his simultaneous insistence on "carefully preserv[ing] the exception which enables the federal writ to grant relief in cases of manifest injustice," *post*, at 515—an exception that he clearly would endorse regardless of the timing of the default.

The effect of such a reworking of the cause and prejudice test would essentially be to dispense with the requirement that the petitioner show cause and instead to focus exclusively on whether there has been a "manifest injustice" or a denial of "fundamental fairness." We are not told whether this inquiry would require the same showing of actual prejudice that is required by the cause and prejudice test as interpreted in *Engle* and in *United States* v. *Frady*, 456 U. S. 152 (1982), but the thrust of the concurrence leaves little doubt that this is so. The showing of prejudice required under

Wainwright v. *Sykes* is significantly greater than that necessary under "the more vague inquiry suggested by the words 'plain error.'" *Engle*, 456 U. S., at 135; *Frady*, *supra*, at 166. See also *Henderson* v. *Kibbe*, 431 U. S. 145, 154 (1977). The habeas petitioner must show "not merely that the errors at . . . trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Frady*, *supra*, at 170. Such a showing of pervasive actual prejudice can hardly be thought to constitute anything other than a showing that the prisoner was denied "fundamental fairness" at trial. Since, for JUSTICE STEVENS, a "constitutional claim that implicates 'fundamental fairness' . . . compels review regardless of possible procedural defaults," *post*, at 501, n. 8, it follows that a showing of prejudice would invariably make a showing of cause unnecessary.

As the concurrence acknowledges, *Engle* expressly rejected this contention that a showing of actual prejudice "should permit relief even in the absence of cause." 456 U. S., at 134, n. 43. It may be true that the former Rule 12(b)(2) of the Federal Rules of Criminal Procedure, as interpreted in *Shotwell Mfg. Co.* v. *United States*, 371 U. S. 341 (1963), and *Davis* v. *United States*, 411 U. S. 233 (1973), treated prejudice as a component of the inquiry into whether there was cause for noncompliance with that rule. But, while the cause and prejudice test adopted in *Wainwright* v. *Sykes* finds its antecedents in cases interpreting Rule 12(b)(2), the Court in *Wainwright* v. *Sykes* declared that it was applying "the rule of *Francis* v. *Henderson* . . . barring federal habeas review absent a showing of 'cause' and 'prejudice' attendant to a state procedural waiver." 433 U. S., at 87. In *Francis*, the Court could not have been clearer that *both* cause and prejudice must be shown, at least in a habeas corpus proceeding challenging a state court conviction. 425 U. S., at 542 (requiring "not only a showing of 'cause' for the defendant's failure to challenge the composition of the grand jury before trial, but also a showing of actual prejudice"). We deal here with habeas review of a state court conviction, and at least three decisions of this Court—*Francis*, *Sykes*, and *Engle*—are unambiguously contrary to the approach taken in the concurrence. We are unprepared, in the face of this weight of authority and in view of the principles of comity and finality these decisions reflect, to reduce the cause requirement to the vestigial role JUSTICE STEVENS envisions for it.

Moreover, although neither *Francis* nor *Wainwright* v. *Sykes* involved a constitutional claim that directly called into question the accuracy of the determination of the petitioner's guilt, the defaulted claims in *Engle*, no less than respondent's claim in this case, did involve issues bearing on the reliability of the verdict. *In re Winship*, 397 U. S. 358 (1970), which was "the basis for [the prisoners'] constitutional claim" in *Engle*, *supra*, at 131, holds that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Winship*, *supra*, at 364. In *Ivan V.* v. *City of New York*, 407 U. S. 203, 205 (1972) *(per curiam)*, the Court held the rule in *Winship* to be retroactive, because "the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function." Consequently, our rejection in *Engle* of the contention advanced today—that cause need not be shown if actual prejudice is shown—is fully applicable to constitutional claims that call into question the reliability of an adjudication of legal guilt.

However, as we also noted in *Engle*, "[i]n appropriate cases" the principles of comity and finality that inform the concepts of cause and prejudice "must yield to the imperative of correcting a fundamentally unjust incarceration." 456 U. S., at 135. We remain confident that, for the most part, "victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard." *Ibid.* But we do not pretend that this will always be true. Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.

There is an additional safeguard against miscarriages of justice in criminal cases, and one not yet recognized in state criminal trials when many of the opinions on which the concurrence relies were written. That safeguard is the right to effective assistance of counsel, which, as this Court has indicated, may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial. *United States* v. *Cronic*, 466 U. S. 648, 657, n. 20 (1984). See also *Strickland* v. *Washington*, 466 U. S., at 693–696. The presence of such a safeguard may properly inform this Court's judgment in determining "[w]hat standards should govern the exercise of the habeas court's equitable discretion" with respect to procedurally defaulted claims, *Reed* v. *Ross*, 468 U. S., at 9. The ability to raise ineffective assistance claims based in whole or in part on counsel's procedural defaults substantially undercuts any predictions of unremedied manifest injustices. We therefore remain of the view that adherence to the cause and prejudice test "in the conjunctive," *Engle*, *supra*, at 134, n. 43, will not prevent federal habeas courts from ensuring the "fundamental fairness [that] is the central concern of the writ of habeas corpus." *Strickland* v. *Washington*, *supra*, at 697.

The cause and prejudice test may lack a perfect historical pedigree. But the Court acknowledged as much in *Wainwright* v. *Sykes*, noting its "historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged." 433 U. S., at 81. The cause and prejudice test as interpreted in *Engle* and in our decision today is, we think, a sound and workable means of channeling the discretion of federal habeas courts.

IV

Respondent has never alleged any external impediment that might have prevented counsel from raising his discovery claim in his petition for review, and has disavowed any claim that counsel's performance on appeal was so deficient as to make out an ineffective assistance claim. See generally *Evitts* v. *Lucey*, 469 U. S. 387 (1985) (right to effective assistance of counsel applies on an appeal as of right). Respondent's petition for federal habeas review of his procedurally defaulted discovery claim must therefore be dismissed for failure to establish cause for the default, unless it is determined on remand that the victim's statements contain material that would establish respondent's actual innocence.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, concurring in the judgment.

The heart of this case is a prisoner's claim that he was denied access to material that might have established his innocence. The significance of such a claim can easily be lost in a procedural maze of enormous complexity.

The nature of the prisoner's claim, and its importance, would be especially easy to overlook in this case because the case involves at least four possible procedural errors. A Virginia trial judge may have erroneously denied respondent's counsel access to statements that the victim had made to the police. The Virginia Supreme Court did not address this issue because, although respondent's counsel included it in the assignment of errors in his "notice of appeal," he omitted it from his "petition for appeal." In a subsequent federal habeas corpus proceeding, the District Court held that the procedural default in the state appellate court effected a waiver of any right to federal relief and therefore dismissed the petition without examining the victim's statements. The Court of Appeals, however, concluded that there was no waiver if counsel's omission was the consequence of inadvertence and ordered a remand for a hearing to determine whether the lawyer had made a deliberate decision to omit the error from the petition for appeal. We granted certiorari to review that decision.

This Court now reverses, holding that there is no need for a hearing on counsel's motivation and that, instead, the District Court should determine whether there is merit to the habeas corpus application by making an examination of the victim's statements. I concur in its judgment remanding the case for further proceedings on the substance of the claim, and dispensing with the procedural hearing ordered by the Court of Appeals; I disagree, however, with much of what the Court has written about "cause and prejudice," as well as with its announcement of a new standard to govern the District Court's ultimate disposition of the case.

I

The character of respondent's constitutional claim should be central to an evaluation of his habeas corpus petition. Before and during his trial on charges of rape and abduction, his counsel made timely motions for discovery of the statements made by the victim to the police. By denying those motions, the trial court significantly curtailed the defendant's ability to cross-examine the prosecution's most important witness, and may well have violated the defendant's right to review "evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment." *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963). That right is unquestionably protected by the Due Process Clause. *Ibid.* See also *United States* v. *Bagley*, 473 U. S. 667 (1985); *United States* v. *Agurs*, 427 U. S. 97 (1976). Indeed, the

Court has repeatedly emphasized the fundamental importance of that federal right.[1]

The constitutional claim advanced by respondent calls into question the accuracy of the determination of his guilt. On the record before us, however, we cannot determine whether or not he is the victim of a miscarriage of justice. Respondent argues that the trial court's analysis was severely flawed.[2] Even if the trial judge applied the correct standard, the conclusion that there was no "exculpatory" material in the victim's statements does not foreclose the possibility that inconsistencies between the statements and the direct testimony would have enabled an effective cross-examination to demonstrate that respondent is actually innocent.[3] On the other hand, it is possible that other evidence of guilt in the record is so overwhelming that the trial judge's decision was clearly not prejudicial to the defendant. The important point is that we cannot evaluate the possibility that respondent may be the victim of a fundamental miscarriage of justice without any knowledge about the contents of the victim's statements.

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[1] See *Brady* v. *Maryland*, 373 U. S., at 87 ("The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly"); *United States* v. *Bagley*, 473 U. S., at 675 ("The *Brady* rule is based on the requirement of due process. Its purpose is . . . to ensure that a miscarriage of justice does not occur").

[2] See *Carrier* v. *Hutto*, 724 F. 2d 396, 399 (CA4 1983) ("Carrier urges that the standard which should have been employed by the court in delimiting discovery was whether the evidence specifically requested was 'material . . . to guilt,' *Brady*, 373 U. S., at 87 . . . not whether it was exculpatory").

[3] Indeed, a major element of respondent's defense was precisely that the victim's identification was mistaken. See Tr. 152–207 (cross-examination of victim); *id.*, at 554–560 (defense closing argument's discussion of problems with victim's identification).

In deciding whether the District Court should have examined these statements before dismissing respondent's habeas corpus petition, it is useful to recall the historic importance of the Great Writ. "The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris* v. *Nelson*, 394 U. S. 286, 290–291 (1969). Its well-known history bears repetition. The writ emerged in England several centuries ago,[4] and was given explicit protection in our Constitution.[5] The first Judiciary Act provided federal habeas corpus for federal prisoners.[6] In 1867, Congress provided the writ of habeas corpus for state prisoners; the Act gave federal courts "power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or any treaty or law of the United States."[7] The current statute confers similar power, 28 U. S. C. § 2241(c)(3), and provides: "The court shall . . . dispose of the matter as law and justice require." 28 U. S. C. § 2243.

As the statute suggests, the central mission of the Great Writ should be the substance of "justice," not the form of procedures. As Justice Frankfurter explained in his separate opinion in *Brown* v. *Allen*, 344 U. S. 443, 498 (1953):

> "The meritorious claims are few, but our procedures must ensure that those few claims are not stifled by undiscriminating generalities. The complexities of our federalism and the workings of a scheme of government involving the interplay of two governments, one of which is subject to limitations enforceable by the other, are not to be escaped by simple, rigid rules which, by avoiding some abuses, generate others."

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[4] See 3 W. Blackstone, Commentaries *129–*138.

[5] Art. I, § 9, cl. 2.

[6] Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81–82.

[7] Judiciary Act of Feb. 5, 1867, ch. 28, 14 Stat. 385–386.

In *Hensley* v. *Municipal Court,* 411 U. S. 345, 349–350 (1973), the Court similarly emphasized this approach, stating:

> "Our recent decisions have reasoned from the premise that habeas corpus is not 'a static, narrow, formalistic remedy,' *Jones* v. *Cunningham,* [371 U. S. 236,] 243 [(1963)], but one which must retain the 'ability to cut through barriers of form and procedural mazes.' *Harris* v. *Nelson,* 394 U. S. 286, 291 (1969). See *Frank* v. *Mangum,* 237 U. S. 309, 346 (1915) (Holmes, J., dissenting). 'The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.' *Harris* v. *Nelson, supra,* at 291.
>
> "Thus, we have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements."

Accordingly, the statutory mandate to "dispose of the matter as law and justice require" clearly requires at least some consideration of the character of the constitutional claim.[8]

II

In my opinion, the "cause and prejudice" formula that the Court explicates in such detail today is not dispositive when the fundamental fairness of a prisoner's conviction is at issue. That formula is of recent vintage, particularly in comparison to the writ for which it is invoked. It is, at most, part of a broader inquiry into the demands of justice.

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[8] See also *Strickland* v. *Washington,* 466 U. S. 668, 697 (1984) ("fundamental fairness is the central concern of the writ of habeas corpus"). Although a constitutional claim that may establish innocence is clearly the most compelling case for habeas review, it is by no means the only type of constitutional claim that implicates "fundamental fairness" and that compels review regardless of possible procedural defaults. See *Rose* v. *Lundy,* 455 U. S. 509, 543–544 (1982) (STEVENS, J., dissenting).

The Court cites *Wainwright* v. *Sykes*, 433 U. S. 72 (1977) as authority for its "cause and prejudice" standard. The actual source of the standard, however, is Rule 12(b)(2) of the Federal Rules of Criminal Procedure. For *Wainwright* relied on cases construing that Rule in announcing the standard. See *id.*, at 84–85.

Rule 12(b)(2) specifies the procedure for asserting defenses and objections based on defects in the institution of a federal prosecution. Until part of the Rule was shifted to Rule 12(f), Rule 12(b)(2) expressly provided that the failure to follow the specified procedure in presenting any such defense or objection "constitutes waiver thereof"; the Rule included a proviso authorizing the court to grant relief from the waiver "for cause shown."[9] Under the terms of the Rule, the inquiry into "cause" was not made to ascertain whether a waiver occurred; rather, its function was to determine whether a waiver should be excused.

The term "prejudice" was not used in Rule 12(b)(2). In construing the rule in *Shotwell Mfg. Co.* v. *United States*, 371 U. S. 341 (1963), however, the Court decided that a consideration of the prejudice to the defendant, or the absence thereof, was an appropriate component of the inquiry into whether there was "cause" for excusing the waiver that had resulted from the failure to follow the Rule.[10] Thus, under the reasoning of the *Shotwell* case—as well as the text of the Rule itself—"cause" and "prejudice" were not separate obstacles that a defendant was required to overcome to avoid a waiver. Rather, the cause component explicitly included an inquiry into "prejudice"—into the nature of the claim and its effect.

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[9] In 1963, when the Court decided *Shotwell Mfg. Co.* v. *United States*, 371 U. S. 341, Rule 12(b)(2) provided in relevant part:

"Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. . . . Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver." See 371 U. S., at 362.

Rule 12 has been amended since 1963 but it retains the provision for an express waiver subject to the proviso that "the court for cause shown may grant relief from the waiver." See Rule 12(f).

[10] "Finally, both courts below have found that petitioners were not prejudiced in any way by the alleged illegalities in the selection of the ju-

In *Davis* v. *United States*, 411 U. S. 233 (1973), the Court held that "the sort of express waiver provision contained in Rule 12(b)(2) which specifically provides for the waiver of a particular kind of constitutional claim if it be not timely asserted," *id.*, at 239–240, bars a challenge, absent "cause," to the composition of the grand jury not only on direct federal review, but also in a federal habeas challenge to a federal conviction. Thus, in *Davis*, as in *Shotwell*, the Court simply enforced a federal rule that contained an express waiver provision. Notably, in *Davis*, the Court again considered both cause *and* prejudice as part of a single inquiry. 411 U. S., at 243–245.

The *Davis* holding, in turn, provided the basis for the Court's decision in *Francis* v. *Henderson*, 425 U. S. 536 (1976). In that case, the Court reviewed a Louisiana rule similar to the Federal Rule at issue in *Davis* and a similar constitutional claim. Relying on *Davis*, the Court held that the state prisoner, having failed to make a timely challenge to the grand jury that indicted him, could not challenge his state conviction in a federal habeas corpus proceeding without making a showing of both "cause" for the failure and "actual prejudice." The Court cited the *Davis* cause-and-prejudice

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ries. Nor do petitioners point to any resulting prejudice. In *Ballard* it was said (at p. 195) that 'reversible error does not depend on a showing of prejudice in an individual case.' However, where, as here, objection to the jury selection has not been timely raised under Rule 12(b)(2), it is entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of that Rule." 371 U. S., at 363 (footnote omitted).

analysis in determining that prejudice had not been established. 425 U. S., at 542, and n. 6.

Davis and *Francis* then provided the basis for the conclusion in *Wainwright* v. *Sykes*, *supra*, that the failure to make a contemporaneous objection to the admission of evidence at trial will ordinarily bar a postconviction attack on the use of such evidence absent an appropriate showing of cause and prejudice. However, the Court's opinion in *Wainwright* v. *Sykes* carefully avoided any rigid definition of the terms "cause" and "prejudice"—terms which under Rule 12 had been used to identify two components of a single inquiry to determine whether an express waiver should be excused. Indeed, in *Wainwright*, the Court made very clear that, although "cause and prejudice" structured a court's inquiry, they were not rigid procedural rules that prevented the writ's fundamental mission—serving justice—from being realized: "The 'cause-and-prejudice' exception of the *Francis* rule will afford an adequate guarantee, we think, that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice." 433 U. S., at 90–91. In *Wainwright* itself, the Court inquired into *both* cause and prejudice; the prejudice inquiry, of course, required some inquiry into the nature of the claim and its effect on the trial. *Id.*, at 91.

In a recent exposition of the "cause and prejudice" standard, moreover, the Court again emphasized that "cause and prejudice" must be considered within an overall inquiry into justice. In *Engle* v. *Isaac*, 456 U. S. 107 (1982), the Court closed its opinion with the assurance that it would not allow its judge-made "cause" and "actual prejudice" standard to become so rigid that it would foreclose a claim of this kind:

> "The terms 'cause' and 'actual prejudice' are not rigid concepts; they take their meaning from the principles of comity and finality discussed above. In appropriate

> cases those principles must yield to the imperative of correcting a fundamentally unjust incarceration. Since we are confident that victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard, see *Wainwright* v. *Sykes*, 433 U. S., at 91; *id.*, at 94–97 (STEVENS, J., concurring), we decline to adopt the more vague inquiry suggested by the words 'plain error.'" *Id.*, at 135.[11]

In order to be faithful to that promise, we must recognize that cause and prejudice are merely components of a broader inquiry which, in this case, cannot be performed without an examination of the victim's statements.[12]

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[11] In the concurring opinion cited by the Court, presumably with approval, I had written:

"The notion that a client must always consent to a tactical decision not to assert a constitutional objection to a proffer of evidence has always seemed unrealistic to me. Conversely, if the constitutional issue is sufficiently grave, even an express waiver by the defendant himself may sometimes be excused. Matters such as the competence of counsel, the procedural context in which the asserted waiver occurred, *the character of the constitutional right at stake*, and the overall fairness of the entire proceeding, may be more significant than the language of the test the Court purports to apply." *Wainwright* v. *Sykes*, 433 U. S. 72, 94–96 (1977) (footnotes omitted; emphasis added).

[12] Inconsistently, in *Engle* v. *Isaac*, alongside its references to fundamental fairness, the Court also emphasized that a failure to show cause could bar review regardless of the character of the claim. See, *e. g.*, 456 U. S., at 134, n. 43 ("Since we conclude that these respondents lacked cause for their default, we do not consider whether they also suffered actual prejudice. Respondents urge that their prejudice was so great that it should permit relief even in the absence of cause. *Sykes*, however, stated these criteria in the conjunctive and the facts of these cases do not persuade us to depart from that approach"); *id.*, at 129 ("The costs outlined above do not depend upon the type of claim raised by the prisoner. While the nature of a constitutional claim may affect the calculation of cause and prejudice, it does not alter the need to make that threshold showing"). The Court's rigid invocation of the "cause" obstacle in an opinion that also emphasized the demands of "fundamental fairness" illustrates the confusion that has accompanied the Court's creation and imposition of the cause-

III

An inquiry into the requirements of justice requires a consideration, not only of the nature and strength of the constitutional claim, but also of the nature and strength of the state procedural rule that has not been observed. In its opinion today, the Court relies heavily on cases in which the defendant failed to make a contemporaneous objection to an error that occurred during a trial. Most of the reasons for finding a waiver in that setting simply do not apply to the appellate process. Of special importance is the fact that the state interest in enforcing its contemporaneous-objection rule is supported, not merely by the concern with finality that characterizes state appellate rules, but also by the concern with making the trial the "main event" in which the issue of guilt or innocence can be fairly resolved.[13]

This Court has not often considered procedural defaults that have occurred at the appellate, rather than trial, level.

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and-prejudice standard. See also *id.*, at 126 ("Today, as in prior centuries, the writ is a bulwark against convictions that violate 'fundamental fairness'") (quoting *Wainwright* v. *Sykes*, 433 U. S., at 97 (STEVENS, J., concurring)).

[13] See *Wainwright* v. *Sykes*, 433 U. S., at 90. Cf. *Engle* v. *Isaac*, 456 U. S., at 136, n. 1 (STEVENS, J., concurring in part and dissenting in part) ("The failure to object generally indicates that defense counsel felt that the trial error was not critical to his client's case; presumably, therefore, the error did not render the trial fundamentally unfair"). Even in the trial context, however, the lack of objection should not be completely preclusive. See *Rose* v. *Lundy*, 455 U. S., at 547–548, n. 17 (STEVENS, J., dissenting):

> "The failure of otherwise competent defense counsel to raise an objection at trial is often a reliable indication that the defendant was not denied fundamental fairness in the state-court proceedings. The person best qualified to recognize such error is normally a defendant's own lawyer. Thus, in searching for fundamental unfairness in a trial record, I attach great importance to the character of the objection, if any, asserted by the defendant's counsel. But if such error is manifest, I would not wrestle with terms such as 'cause' and 'prejudice' to determine whether habeas corpus relief should be granted."

In my view, it is not a coincidence that three of the most forceful and incisive analyses of the relationship between federal habeas corpus and state procedural defaults have emerged in the few cases involving appellate defaults. For, with an appellate default, the state interest in procedural rigor is weaker than at trial, and the transcendence of the Great Writ is correspondingly clearer. The opinions to which I refer are the dissenting opinions in *Daniels* v. *Allen*, 344 U. S. 443 (1953), and the Court's opinions in *Fay* v. *Noia*, 372 U. S. 391 (1963), and *Reed* v. *Ross*, 468 U. S. 1 (1984).

In *Daniels*, one of the three cases that gave rise to the opinions in *Brown* v. *Allen*, 344 U. S. 443 (1953), two petitioners challenged their convictions and death sentences on the ground that the trial judge had erroneously denied their timely objection to the admission of allegedly coerced confessions and to the alleged discrimination against blacks in the selection of both grand and petit jurors. See *id.*, at 453. After the trial court entered judgment and pronounced its sentence, the petitioners filed a notice of appeal and were granted 60 days in which to serve a statement of the case on opposing counsel. As a result of the negligence or inadvertence of petitioners' counsel, the statement was not served on the prosecutor until the 61st day and petitioners' right to appeal was lost. The State Supreme Court declined to exercise its discretion to review the merits of their appeal.

For reasons that are ambiguous at best,[14] the Court held that the procedural default barred a subsequent federal habeas corpus petition unless the opportunity to appeal had been lost "because of lack of counsel, incapacity, or some interference by officials." *Id.*, at 485–486. Because the *Daniels* holding was repudiated in *Fay* v. *Noia*, 372 U. S. 391 (1963), Justice Black's penetrating dissent commands greater respect than Justice Reed's ambiguous opinion for the Court.[15] Justice Black wrote:

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[14] Commenting on the holding in *Daniels*, Justice Harlan wrote:

"Language in Mr. Justice Reed's opinion for the Court appeared to support the result alternatively in terms of waiver, failure to exhaust state remedies, and the existence of an adequate state ground. But while the explanation may have been ambiguous, the result was clear: habeas corpus would not lie for a prisoner who was detained pursuant to a state judgment which, in the view of the majority in *Daniels*, rested on a reasonable application of the State's own procedural requirements." *Fay* v. *Noia*, 372 U. S. 391, 461–462 (1963) (dissenting opinion) (footnotes omitted).

> "*Fourth. Daniels* v. *Allen*, No. 20. Here also evidence establishes an unlawful exclusion of Negroes from juries because of race. The State Supreme Court refused to review this evidence on state procedural grounds. Absence of state court review on this ground is now held to cut off review in federal habeas corpus proceedings. But in the two preceding cases where the State Supreme Court did review the evidence, this Court has also reviewed it. I find it difficult to agree with the soundness of a philosophy which prompts this Court to grant a second review where the state has granted one but to deny any review at all where the state has granted none.
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> . . . . .
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> "The Court thinks that to review this question and grant petitioners the protections guaranteed by the Constitution would 'subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime.' I cannot agree. State systems are not so feeble. And the object of habeas corpus is to search records to prevent illegal imprisonments. To hold it unavailable under the circumstances here is to degrade it. I think *Moore* v. *Dempsey*, 261 U. S. 86, forbids this. In that case Negroes had been convicted and sentenced to death by an all-white jury selected under a

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[15] Indeed, even the dissenters in *Fay* v. *Noia* did not defend the specific analysis in *Daniels*. See 372 U. S., at 462 (Harlan, J., dissenting) ("I do not pause to reconsider here the question whether the state ground in *Daniels* was an adequate one; persuasive arguments can be made that it was not").

> practice of systematic exclusion of Negroes from juries. The State Supreme Court had refused to consider this discrimination on the ground that the objection to it had come too late. This Court had denied certiorari. Later a federal district court summarily dismissed a petition for habeas corpus alleging the foregoing and other very serious acts of trial unfairness, all of which had been urged upon this Court in the prior certiorari petition. This Court nevertheless held that the District Court had committed error in refusing to examine the facts alleged. I read *Moore* v. *Dempsey*, *supra*, as standing for the principle that it is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution. Cf. *United States* v. *Kennedy*, 157 F. 2d 811, 813. Perhaps there is no more exalted judicial function. I am willing to agree that it should not be exercised in cases like these except under special circumstances or in extraordinary situations. But I cannot join in any opinion that attempts to confine the Great Writ within rigid formalistic boundaries." *Brown* v. *Allen*, 344 U. S., at 552–554.

With respect to the specific argument that the Court should not permit federal habeas corpus to be used as a substitute for a state appeal, Justice Frankfurter similarly responded:

> "The basic reason for closing both the federal and State courts to the petitioners on such serious claims and under these circumstances is the jejune abstraction that habeas corpus cannot be used for an appeal. Judge Soper dealt with the deceptiveness of this formula by quoting what Judge Learned Hand had found to be the truth in regard to this generality thirty years ago:
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> "'We shall not discuss at length the occasions which will justify resort to the writ, where the objection has been

> open on appeal. After a somewhat extensive review of the authorities twenty-four years ago, I concluded that the law was in great confusion; and the decisions since then have scarcely tended to sharpen the lines. We can find no more definite rule than that the writ is available, not only to determine points of jurisdiction, stricti juris, and constitutional questions; but whenever else resort to it is necessary to prevent a complete miscarriage of justice.' *Kulick* v. *Kennedy*, 157 F. 2d 811, 813." *Id.*, at 558 (dissenting opinion).

Thus, in their *Daniels* dissents, both Justice Black and Justice Frankfurter vigorously disagreed with the Court's view that the petitioners' appellate default—their failure to file a timely appeal—barred review of a meritorious constitutional claim.

As noted, the view of the *Daniels* Court on the propriety of federal habeas proceedings after a procedural default was repudiated in *Fay* v. *Noia*, 372 U. S. 391 (1963), a case which also concerned an appellate default. Noia had made a timely objection to the admissibility of his confession in his trial on a charge of felony murder, but he allowed the time for a direct appeal to lapse without seeking review by a New York appellate court. In response to his subsequent application for a federal writ of habeas corpus, the State admitted that his conviction rested on a confession that had been obtained from him in violation of the Fourteenth Amendment, but contended that his failure to appeal foreclosed any relief in the federal courts. This Court rejected that contention. In a comprehensive opinion the Court restated three propositions of law that have not thereafter been questioned; the *Noia* opinion also, however, contained certain dicta that has been qualified by later opinions.

The propositions that *Noia* firmly established are these: First, the *power* of the federal district court to issue the writ of habeas corpus survives an adverse decision by a state court, whether the state judgment is based on a review of the merits of the federal claim or on the applicant's procedural default.[16] Second, although a State's interest in orderly appellate procedure justifies a denial of appellate review *in the state system* when the inadvertence or neglect of defense counsel causes a procedural default, that state interest is not sufficient to bar a federal remedy in appropriate cases.[17]

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[16] "We have reviewed the development of habeas corpus at some length because the question of the instant case has obvious importance to the proper accommodation of a great constitutional privilege and the requirements of the federal system. Our survey discloses nothing to suggest that the Federal District Court lacked the *power* to order Noia discharged because of a procedural forfeiture he may have incurred under state law. On the contrary, the nature of the writ at common law, the language and purpose of the Act of February 5, 1867, and the course of decisions in this Court extending over nearly a century are wholly irreconcilable with such a limitation. At the time the privilege of the writ was written into the Federal Constitution it was settled that the writ lay to test any restraint contrary to fundamental law, which in England stemmed ultimately from Magna Charta but in this country was embodied in the written Constitution. Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the federal courts to their constitutional maximum. Obedient to this purpose, we have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. State procedural rules plainly must yield to this overriding federal policy." 372 U. S., at 426–427.

[17] "A man under conviction for crime has an obvious inducement to do his very best to keep his state remedies open, and not stake his all on the outcome of a federal habeas proceeding which, in many respects, may be less advantageous to him than a state court proceeding. See *Rogers* v. *Richmond,* 365 U. S. 534, 547–548. And if because of inadvertence or neglect he runs afoul of a state procedural requirement, and thereby forfeits his state remedies, appellate and collateral, as well as direct review thereof in this Court, those consequences should be sufficient to vindicate the State's valid interest in orderly procedure. Whatever residuum of state interest there may be under such circumstances is manifestly insufficient in the face of the federal policy, drawn from the ancient principles of the writ of habeas corpus, embodied both in the Federal Constitution and in the habeas corpus provisions of the Judicial Code, and consistently upheld by this

Third, as the converse of the second proposition, *Noia* also holds that the federal district court has discretion to deny relief based on state procedural defaults in appropriate cases.[18] None of these propositions has been questioned in any subsequent case.

The dicta in the *Noia* opinion that has been questioned was an attempt to prescribe a rather rigid limitation on the district court's discretion to deny habeas corpus relief based on the applicant's procedural default. The opinion set forth a standard that seemingly required federal judges to excuse every procedural default unless the habeas applicant had personally approved of his lawyer's deliberate decision to bypass an available state procedure.[19] The breadth of that dicta was

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Court, of affording an effective remedy for restraints contrary to the Constitution." *Id.*, at 433–434.

[18] "Discretion is implicit in the statutory command that the judge, after granting the writ and holding a hearing of appropriate scope, 'dispose of the matter as law and justice require,' 28 U. S. C. § 2243; and discretion was the flexible concept employed by the federal courts in developing the exhaustion rule. Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles. *United States ex rel. Smith* v. *Baldi*, 344 U. S. 561, 573 (dissenting opinion). Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks. Narrowly circumscribed, in conformity to the historical role of the writ of habeas corpus as an effective and imperative remedy for detentions contrary to fundamental law, the principle is unexceptionable." *Id.*, at 438.

[19] "If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. Cf. *Price* v. *Johnston*, 334 U. S. 266, 291. At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. Cf. *Carnley* v. *Cochran*, 369 U. S. 506, 513–517; *Moore* v. *Michigan*, 355 U. S. 155,

ultimately disavowed in *Wainwright* v. *Sykes*, 433 U. S., at 87–88,[20] but the Court has remained faithful to the specific holding in *Noia*—that appellate default in the state system need not bar federal habeas review—as well as to the basic principles announced in that opinion.

Finally, in *Reed* v. *Ross*, 468 U. S. 1 (1984), we again considered the consequences of an appellate procedural default. The defendant had not raised the constitutional error in his appeal to the North Carolina Supreme Court. Relying on *Fay* v. *Noia*, we reaffirmed that the federal court has power to look beyond the state procedural default and entertain the state prisoner's application for a writ of habeas corpus.[21] In determining whether the power should be exercised, we found that the requirements of "cause" and "prejudice" that had been discussed in *Wainwright* v. *Sykes* had both been satisfied. The "cause" for the failure to object was the fact that counsel had not anticipated later decisions from this Court that supported the claim. We explained:

162–165. A choice made by counsel not participated in by the petitioner does not automatically bar relief." *Id.*, at 439 (footnote omitted).

[20] "It is the sweeping language of *Fay* v. *Noia*, going far beyond the facts of the case eliciting it, which we today reject." 433 U. S., at 87–88.

"We have no occasion today to consider the *Fay* rule as applied to the facts there confronting the Court. . . .

"The Court in *Fay* stated its knowing-and-deliberate-waiver rule in language which applied not only to the waiver of the right to appeal, but to failures to raise individual substantive objections in the state trial." *Id.*, at 88, n. 12.

[21] "Our decisions have uniformly acknowledged that federal courts are empowered under 28 U. S. C. § 2254 to look beyond a state procedural forfeiture and entertain a state prisoner's contention that his constitutional rights have been violated. See, *e. g.*, *Francis* v. *Henderson*, 425 U. S. 536, 538 (1976); *Fay* v. *Noia*, 372 U. S. 391, 398–399 (1963). See generally W. Duker, A Constitutional History of Habeas Corpus 181–211 (1980). The more difficult question, and the one that lies at the heart of this case is: What standards should govern the exercise of the habeas court's equitable discretion in the use of this power?" 468 U. S., at 9.

> "[T]he cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests. And the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the requirement is met." *Reed* v. *Ross*, 468 U. S., at 14.

In the *Reed* opinion we carefully identified the valid state interest that is served by enforcing a procedural default that forecloses state appellate review of a federal constitutional claim, *id.*, at 10–11; *ante*, at 490–491. But we squarely held that this interest is not sufficient to defeat a meritorious federal claim:

> "It is true that finality will be disserved if the federal courts reopen a state prisoner's case, even to review claims that were so novel when the cases were in state court that no one would have recognized them. *This Court has never held, however, that finality, standing alone, provides a sufficient reason for federal courts to compromise their protection of constitutional rights under § 2254.*" 468 U. S., at 15 (emphasis added).

We thus concluded that the appellate default would not bar federal consideration of the constitutional claim.

Like the *Daniels* dissenters, then, in *Fay* and in *Reed*, against the backdrop of appellate defaults, the Court stressed that the State's interest in finality does not preclude review of the federal constitutional claim in a federal habeas court. To be sure, these opinions suggested that the *power* to hear claims which had been defaulted on appeal should be used sparingly—in "special circumstances," in the absence of "deliberate bypass," upon a showing of "cause." Even under such terms, however, our holding in *Reed* governs the case before us today. If the State's interest in the finality of its judgment is not sufficient to defeat a meritorious federal claim that was not raised on appeal because the prisoner's lawyer did not have the ability to anticipate a later development in the law, there is no reason why the same state interest should defeat a meritorious federal claim simply because the prisoner's lawyer did not exercise due care in prosecuting an appeal. There is no more reason to saddle an innocent prisoner with counsel's omission in one case than in the other.

IV

Procedural default that is adequate to foreclose appellate review of a claim of constitutional error in a state criminal trial should ordinarily also bar collateral review of such a claim in a federal district court. But the history of the Court's jurisprudence interpreting the Acts of Congress authorizing the issuance of the writ of habeas corpus unambiguously requires that we carefully preserve the exception which enables the federal writ to grant relief in cases of manifest injustice. That exception cannot be adequately defined by a simply stated rule. The procedural default is always an important factor to be carefully reviewed; as Justice Frankfurter explained: "All that has gone before is not to be ignored as irrelevant." *Brown* v. *Allen*, 344 U. S., at 500. But it is equally clear that the prisoner must always have some opportunity to reopen his case if he can make a sufficient showing that he is the victim of a fundamental miscarriage of justice. Whether the inquiry is channeled by the use of the terms "cause" and "prejudice"—or by the statutory duty to "dispose of the matter as law and justice require," 28 U. S. C. § 2243—it is clear to me that appellate procedural default should not foreclose habeas corpus review of a meritorious constitutional claim that may establish the prisoner's innocence.

The Court is therefore entirely correct in its decision to remand the case for further proceedings on the substance of respondent's claim. *Ante*, at 497. Because we did not grant certiorari to consider the proper standard that should govern the further proceedings in the District Court, and because we have not had the benefit of briefs or argument concerning that standard, I express no opinion on the Court's suggestion that the absence of "cause" for his procedural default requires respondent to prove that the "constitutional violation has probably resulted in the conviction of one who is actually innocent," *ante*, at 496, or on the relationship of that standard to the principles explicated in *United States* v. *Bagley*, 473 U. S. 667 (1985); *United States* v. *Agurs*, 427 U. S. 97 (1976); and *Brady* v. *Maryland*, 373 U. S. 83 (1963). There will be time enough to consider the proper standard after the District Court has examined the victim's statements and made whatever findings may be appropriate to determine whether "law and justice require" the issuance of the Great Writ in this case.

Accordingly, I concur in the judgment but not in the Court's opinion.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.*

I

A

Like the Great Writ from which it draws its essence, see *Engle* v. *Isaac*, 456 U. S. 107, 126 (1982), the root principle underlying 28 U. S. C. § 2254 is that government in a civilized society must always be accountable for an individual's imprisonment; if the imprisonment does not conform to the fundamental requirements of law, the individual is entitled to his immediate release. Of course, the habeas corpus relief available under § 2254 differs in many respects from its common-law counterpart. Most significantly, the scope of the writ has been adjusted to meet changed conceptions of the kind of criminal proceedings so fundamentally defective as to make imprisonment under them unacceptable. See, *e. g.*, *Moore* v. *Dempsey*, 261 U. S. 86 (1923); *Johnson* v.

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*[This opinion applies also to No. 85-5487, *Smith* v. *Murray, Director, Virginia Department of Corrections*, *post*, p. 527.]

Zerbst, 304 U. S. 458 (1938); *Waley* v. *Johnston*, 316 U. S. 101 (1942); *Brown* v. *Allen*, 344 U. S. 443 (1953); *Fay* v. *Noia*, 372 U. S. 391 (1963). At the same time, statutory habeas relief has become more difficult to obtain as a result of certain procedural limitations created to reflect the unique character of our federal system. See, *e. g.*, 28 U. S. C. §2254(b) (exhaustion of state remedies).

The "cause and prejudice" rule of *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), is one such procedural limitation. A judicially created restriction that is not required—or even suggested—by the habeas statute itself, the "cause and prejudice" rule is sometimes thought to represent an application of the familiar principle that this Court will decline to review state-court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions. To be sure, the fact that a state-court judgment rests on a purely procedural ground may preclude direct Supreme Court review of that judgment where, as applied, the state procedural rule furthers a legitimate interest. See *Henry* v. *Mississippi*, 379 U. S. 443, 447–449 (1965). However, in *Fay* v. *Noia*, *supra*, the doctrine that procedural defaults may constitute an independent and adequate state-law ground was held not to limit the jurisdiction of the federal courts under the habeas corpus statute. *Id.*, at 426–435. That conclusion has subsequently been reaffirmed on several occasions. See *Francis* v. *Henderson*, 425 U. S. 536, 538 (1976); *Wainwright* v. *Sykes*, *supra*, at 83; *Reed* v. *Ross*, 468 U. S. 1, 9 (1984).

Despite the existence of federal *power* to entertain a habeas petition in the face of a procedural default, the Court in *Fay* v. *Noia* acknowledged "a limited discretion" in the federal court to refuse to exercise its jurisdiction on behalf of "an applicant who has deliberately by-passed the orderly procedure of the state courts and in doing so has forfeited his state court remedies." 372 U. S., at 438. This exception was recognized "[a]s a matter of comity," *Wainwright* v. *Sykes*, *supra*, at 83, in order to accord state courts and state procedures the respect due them in a federal system. See *Reed* v. *Ross*, *supra*, at 10–11; *Engle* v. *Isaac*, *supra*, at 126–129; *Francis* v. *Henderson*, *supra*, at 539. Thus, the withholding of federal habeas jurisdiction for certain procedurally defaulted claims is a form of abstention. Cf., *e. g.*, *Younger* v. *Harris*, 401 U. S. 37 (1971); *Burford* v. *Sun Oil Co.*, 319 U. S. 315 (1943).[1]

The general principles for deciding whether abstention is proper are well established. "Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800, 813 (1976). As we have previously noted, "'[t]he doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.'" *Ibid.* (quoting *Allegheny County* v. *Frank Mashuda Co.*, 360 U. S. 185, 188 (1959)). Where Congress has granted individuals the right to a federal forum, we cannot deny that right simply because we disagree with Congress' determination that federal review is desirable. Rather, abstention must be justified by weighty concerns of comity and judicial administration, and even then abstention should not be ordered without a careful balancing of those concerns against concerns favoring the exercise of federal jurisdiction. Cf. *Steffel* v. *Thompson*, 415 U. S. 452,

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[1] There is one important difference between abstention in the habeas context and in other contexts. In our other abstention cases, federal jurisdiction has been withheld partly because of ongoing proceedings or the possibility of future proceedings in the state courts; in the habeas context, the state proceedings have already taken place and the petitioner's federal claim has not been considered on the merits. If anything, however, this difference makes the practice of abstaining more suspect in the habeas context, and suggests that the federal courts should adhere even more closely to the principle—discussed in text—that abstention is a narrow exception to the general rule requiring federal courts to exercise power conferred upon them by Congress.

460–462 (1974); *Wooley* v. *Maynard*, 430 U. S. 705, 709–712 (1977); *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922 (1975).

These principles apply as much to abstention from the exercise of federal habeas corpus jurisdiction as to any other area of federal jurisdiction. For while Congress did leave the federal courts considerable latitude to shape the availability of the writ, Congress did not issue this Court a mandate to sharpen its skills at ad hoc legislating. The same rules of construction that guide interpretation of other statutes apply to the federal habeas corpus statute. Accordingly, the decision whether to direct federal courts to withhold habeas jurisdiction clearly conferred upon them by Congress must be made with the understanding that such abstention doctrines constitute "'extraordinary and narrow'" exceptions to the "virtually unflagging obligation" of federal courts to exercise their jurisdiction, *Colorado River Water Construction District* v. *United States*, *supra*, at 813, 817 (quoting *Allegheny County* v. *Frank Mashuda Co.*, *supra*, at 188). Moreover, judicial renouncement of federal habeas corpus jurisdiction can take place only after careful consideration of the competing interests militating for and against the exercise of federal jurisdiction, and the presumption is heavily in favor of exercising federal jurisdiction. 424 U. S., at 817.

B

The competing interests implicated by a prisoner's petition to a federal court to review the merits of a procedurally defaulted constitutional claim are easily identified. On the one hand, "there is Congress' expressed interest in providing a federal forum for the vindication of the constitutional rights of state prisoners." *Reed* v. *Ross*, 468 U. S., at 10. In enacting § 2254, "Congress sought to 'interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action.'" *Ibid.* (quoting *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972)). This interest is at its strongest where the state court has declined to consider the merits of a constitutional claim, for without habeas review no court will ever consider whether the petitioner's constitutional rights were violated.

These interests must be weighed against the State's interest in maintaining the integrity of its rules and proceedings, an interest that would be undermined if the federal courts were too free to ignore procedural forfeitures in state court. 468 U. S., at 10. The criminal justice system in each State is structured both to determine the guilt or innocence of defendants and to resolve all questions incident to that determination, including the constitutionality of the procedures leading to the verdict. Each State's complement of procedural rules facilitates this process by "channeling, to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Ibid.* Procedural default rules protect the integrity of this process by imposing a forfeiture sanction for failure to follow applicable state procedural rules, thereby deterring litigants from deviating from the State's scheme. Generally, the threat of losing the right to raise a claim in state proceedings will be sufficient to ensure compliance with the State's procedural rules: a defendant loses nothing by raising all of his claims at trial since the state-court judgment will have no res judicata effect in later habeas proceedings, *Brown* v. *Allen*, 344 U. S. 443 (1953), while he retains the possibility of obtaining relief in the state courts. See *Wainwright* v. *Sykes*, 433 U. S., at 103–104, and n. 5 (BRENNAN, J., dissenting). Nonetheless, to the extent that federal habeas review of a procedurally defaulted claim is available, the broad deterrent effect of these procedural default rules is somewhat diminished.[2]

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[2] The Court has often suggested, as it does again today, that the "reduction in the finality of litigation" caused by habeas review justifies a broad construction of the cause-and-prejudice test. *Ante*, at 486–487 (citing *Engle* v. *Isaac*, 456 U. S. 107, 128 (1982)). In fact, "finality" concerns

The Court's view of how properly to balance these competing concerns has changed over time. In *Fay* v. *Noia*, we concluded that the State's interest "in an airtight system of forfeitures" was generally insufficient to require federal courts to refrain from exercising their habeas jurisdiction. 372 U. S., at 432, 438–440. We held that federal courts should refuse to exercise their jurisdiction only "[i]f a habeas applicant . . . understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures." *Id.*, at 439. This holding sensibly ac-

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have no bearing on the question whether a federal court should refuse to exercise its habeas jurisdiction because of a procedural default. From the standpoint of the State's finality interests, there is no difference whatever between making habeas review available after the state court has denied a claim on the merits, and making such review available after the state court has denied the claim on procedural default grounds. In both situations, the State has determined that the litigation is at an end, and the federal court has reopened the case to consider releasing the petitioner from custody. No one questions the availability of habeas relief where the state court has denied the claim on the merits. Accordingly, treating likes alike, such relief should also be available where the claim is denied because of a procedural default *unless the State's interest in enforcing its default rules requires a different result.* General "finality" concerns simply are not relevant.

The same is true of the Court's other habeas corpus bogeymen, such as the tendency of habeas review to detract from the importance of the trial as the "main event," *Wainwright* v. *Sykes*, 433 U. S. 72, 90 (1977), and to frustrate the State's "good-faith attempts to honor constitutional rights," *Engle* v. *Isaac*, *supra*, at 128. These "costs" are present whenever a claim has been denied by the state court on the merits in precisely the same way and to precisely the same extent as where that claim is denied on procedural default grounds. Indeed, if anything, these "costs" are present to a *greater* extent where a federal court reviews a constitutional claim that the state court has considered and rejected. Therefore, if federal jurisdiction is to be renounced where there has been a procedural default, it must be because of some particular need to enforce the State's procedural default rules.

commodated the competing interests described above: on the one hand, the State's interest in preventing litigants from ignoring its procedural rules is at its strongest where the decision not to raise a claim is made knowingly and deliberately; correspondingly, the prisoner's entitlement to a federal forum is at its weakest since it may well be only the deliberate failure to submit the claim to the state courts that has necessitated federal review. Under these circumstances, the affront to comity principles is at its greatest: by its indifference in entertaining the petition to the prisoner's trial strategy, the federal court in effect ratifies the deliberate circumvention of state procedural rules. If refusal to exercise federal habeas power to upset a state-court conviction is ever appropriate, it is under circumstances such as these.

The Court struck a somewhat different balance 14 years later when it revisited the question of withholding federal habeas jurisdiction of procedurally defaulted claims in *Wainwright* v. *Sykes*. Police officers testified at Sykes' trial about inculpatory statements he had made in their presence. No objection was made at the time this testimony was offered, which meant, under a state procedural rule, that any objections were forfeited. Subsequently, Sykes filed a petition for a writ of habeas corpus in the federal court, asserting that his statements were inadmissible because he had not understood his *Miranda* warnings. The District Court granted the writ, but this Court reversed, holding that the District Court should never have entertained Sykes' habeas petition at all. Rejecting "the sweeping language of *Fay* v. *Noia*," the Court concluded that *Fay*'s deliberate bypass test paid insufficient respect to the State's interests—viewed through the prism of federalism and comity concerns—in seeing its procedural default rules enforced. 433 U. S., at 87–88. The Court held instead that federal courts should decline to exercise their habeas jurisdiction absent a stronger showing by the prisoner that federal review is appropriate. Specifically, the Court held that federal habeas review of a procedurally defaulted claim should ordinarily be withheld unless the petitioner shows "cause" for the procedural default and "prejudice" to his case from the underlying error. *Id.*, at 87.

The Court left open "for resolution in future decisions the precise definition of the 'cause'-and-'prejudice' standard," *ibid.*, noting only that "it is narrower than the standard set forth," *ibid.*, in *Fay* v. *Noia*, and suggesting that, as such, it would provide a better balance between the interests of a petitioner and those of the State, *id.*, at 88–91. I thought then that *Wainwright* v. *Sykes* was wrongly decided, and I continue to believe so for the reasons I stated there and in subsequent cases. See *Wainwright* v. *Sykes*, *supra*, at 99–118 (BRENNAN, J., dissenting); *Engle* v. *Isaac*, 456 U. S., at 137–151 (BRENNAN, J., dissenting); *United States* v. *Frady*, 456 U. S. 152, 178–187 (1982) (BRENNAN, J., dissenting). But at least the Court in *Wainwright* v. *Sykes* was prudent enough to leave the task of defining "cause" and "prejudice" to subsequent cases. For, to the extent that the availability of federal habeas review of procedurally defaulted claims turns on the cause-and-prejudice test,[3] then it is in the context of giving that test meaning that the Court must undertake the careful evaluation of the interests of the State and defendant that is required to determine whether federal courts may properly decline to exercise jurisdiction conferred upon them by Congress.

II

A

The particular question we must decide in this case is whether counsel's inadvertent failure to raise a substantive claim of error can constitute "cause" for the procedural default. *Wainwright* v. *Sykes* held that defense counsel's tactical decision to bypass a state procedure does not constitute cause. 433 U. S., at 91, n. 14; see also *ante*, at 485; *Reed* v. *Ross*, 468 U. S., at 13. That result may arguably be defended on grounds similar to those which justified the result in *Fay* v. *Noia*, *i. e.*, that the deterrent interests underlying the State's procedural default rule are at their apogee where counsel's decision to bypass a state procedure is deliberate. However, to say that the petitioner should be bound to his lawyer's tactical decisions is one thing; to say that he must also bear the burden of his lawyer's inadvertent mistakes is quite another. Where counsel is unaware of a claim or of the duty to raise it at a particular time, the procedural default rule cannot operate as a specific deterrent to noncompliance with the State's procedural rules. Consequently, the State's interest in ensuring that the federal court help prevent circumvention of the State's procedural rules by imposing the same forfeiture sanction is much less compelling. To be sure, applying procedural default rules even to inadvertent defaults furthers the State's deterrent interests in a general sense by encouraging lawyers to be more conscientious on the whole. However, as the Court has pointed out in another context, such general deterrent interests are weak where the failure to follow a rule is accidental rather than intentional. See *United States* v. *Leon*, 468 U. S. 897, 908-917 (1984).

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[3] Although *Wainwright* v. *Sykes* held only that the cause-and-prejudice test should be applied to violations of contemporaneous-objection rules, subsequent cases have extended the cause-and-prejudice test well beyond that narrow holding. See *Engle* v. *Isaac*, 456 U. S. 107 (1982); *United States* v. *Frady*, 456 U. S. 152 (1982); *Reed* v. *Ross*, 468 U. S. 1 (1984). It is still an open question "whether counsel's decision not to take an appeal at all"—the question presented on the facts of *Fay* v. *Noia*—is governed by the deliberate bypass rule or the cause-and-prejudice test. *Ante*, at 492.

I believe that this incremental state interest simply is not sufficient to overcome the heavy presumption against a federal court's refusing to exercise jurisdiction clearly granted by Congress. This is especially so where the petitioner has satisfied the prejudice prong of the *Wainwright* v. *Sykes* test. That is, where a petitioner's constitutional rights have been violated and that violation may have affected the verdict, a federal court should not decline to entertain a habeas petition solely out of deference to the State's weak interest in punishing lawyers' inadvertent failures to comply with state procedures. I would therefore hold that "cause" is established where a procedural default resulted from counsel's inadvertence, and I respectfully dissent from the Court's decisions in both *Murray* v. *Carrier*, No. 84-1554, and *Smith* v. *Murray*, No. 85-5487.[4]

B

Even if I did not believe that this difference in the *State*'s interests was sufficient to require holding that counsel's inadvertence constitutes cause, there is an additional difference in the *defendant*'s interests that compels this conclusion in *Smith* v. *Murray:* the fact that it is a capital case. To the extent that, as I have argued above, the definition of cause requires consideration of the interests of the defendant as well as of the State, it strikes me as cruelly unfair to bind a defendant to his lawyer's inadvertent failure to prevent prejudicial constitutional error—thus barring access to federal review—where the consequence to the defendant is death. With the understanding that "execution is the most irremediable and unfathomable of penalties; that death is different," *Ford* v. *Wainwright*, *ante*, at 411; see also *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.), this Court has been particularly scrupulous in demanding that the proceedings which condemn an individual to death not be marred by constitutional error. Against this background of special concern, "comity" and "federalism" concerns simply do not require such an exercise of this Court's discretion in capital cases.

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[4] I do not mean to suggest by this that I accept the Court's decision in *Wainwright* v. *Sykes* or that I think that a habeas petitioner should ever have to show "cause" and "prejudice" to gain access to the federal courts under § 2254. As noted above, I continue to believe that *Wainwright* v. *Sykes* represented an illegitimate exercise of this Court's very limited discretion to order federal courts to decline to entertain habeas petitions. My point is simply that, even accepting the validity of *Wainwright*'s "cause and prejudice" test, the Court must still carefully balance the relevant interests, and, when this balancing is done properly, it is apparent that counsel's inadvertence should constitute "cause." Accordingly, I would affirm the decision of the Court of Appeals in *Murray* v. *Carrier*.

While reversing the holding of the Court of Appeals that counsel's inadvertence establishes "cause," the Court goes on to declare that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal court may grant the writ even in the absence of a showing of cause for the procedural default." *Ante*, at 496. Under such circumstances, the Court explains, "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" *Ante*, at 495 (quoting *Engle* v. *Isaac*, *supra*, at 135). Although I believe that principles of "comity" and "finality" yield upon far less than a showing of actual innocence, because this inquiry represents a narrowing of the "cause and prejudice" test, I agree that it is proper.

SMITH *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-5487. Argued March 4, 1986—Decided June 26, 1986

Prior to petitioner's trial in a Virginia state court for murder of a woman, he was examined by a psychiatrist appointed by the court at the request of his counsel. During the examination, the psychiatrist asked petitioner both about the murder and prior incidents of deviant sexual conduct, and petitioner stated that he once tore the clothes off a girl on a school bus before deciding not to rape her. Following a jury trial, petitioner was convicted. At the sentencing phase, the prosecution called the psychiatrist to the stand, and, over the defense's objection, he described the incident on the school bus. After further evidence was presented both for the prosecution and petitioner, the jury recommended the death sentence. On appeal to the Supreme Court of Virginia, petitioner raised a number of claims but did not assign any error concerning the admission of the psychiatrist's testimony, his counsel later explaining at a postconviction hearing that he had decided not to pursue that claim after determining that Virginia case law would not support his position at the time. The Supreme Court affirmed the conviction and sentence, not addressing any issues concerning the prosecution's use of the psychiatric testimony because under a rule of the court only errors assigned by the appellant would be considered. After exhausting state remedies, petitioner sought a writ of habeas corpus in Federal District Court, which denied the petition. The Court of Appeals affirmed.

Held: Petitioner defaulted his underlying constitutional claim as to the admission of the psychiatrist's testimony by failing to press it before the Supreme Court of Virginia on direct appeal. *Murray* v. *Carrier*, *ante*, p. 478. Pp. 533-539.

(a) Petitioner has not carried his burden of showing cause for his noncompliance with Virginia's rules of procedure. A deliberate, tactical decision not to pursue a particular claim is the very antithesis of the kind of circumstance that would warrant excusing a defendant's failure to adhere to a State's rules for the fair and orderly disposition of its criminal cases. Here, counsel's decision not to press the claim in question was not an error of such magnitude that it rendered his performance constitutionally deficient under the test of *Strickland* v. *Washington*, 466

U. S. 668. Nor can petitioner rely on the novelty of the claim as "cause" for noncompliance with Virginia's rules, where it appears that various forms of such a claim had been percolating in the lower courts for years at the time of petitioner's original appeal. Pp. 533–537.

(b) It is clear on the record that application of the cause and prejudice test will not result in a "fundamental miscarriage of justice," where the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones. Thus, even assuming that, as a legal matter, the psychiatrist's testimony should not have been presented to the jury, its admission did not pervert the jury's deliberations concerning the ultimate question of whether *in fact* petitioner constituted a continuing threat to society. Pp. 537–539.

769 F. 2d 170, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *ante*, p. 516. STEVENS, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, and in Parts II and III of which BRENNAN, J., joined, *post*, p. 539.

J. Lloyd Snook III, by appointment of the Court, 474 U. S. 993, argued the cause for petitioner. With him on the briefs was *Richard J. Bonnie*.

James E. Kulp, Senior Assistant Attorney General of Virginia, argued the cause for respondent. With him on the brief were *William G. Broaddus*, Attorney General, and *Frank S. Ferguson*, Assistant Attorney General.*

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certiorari to decide whether and, if so, under what circumstances, a prosecutor may elicit testimony from a mental health professional concerning the content of an interview conducted to explore the possibility of presenting psychiatric defenses at trial. We also agreed to review the

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*Briefs of *amici curiae* urging reversal were filed for the American Psychiatric Association et al. by *Joel I. Klein*, *Joseph N. Onek*, and *Peter E. Scheer*; for the American Psychological Association by *Bruce J. Ennis, Jr.*, and *Donald N. Bersoff*; and for the New Jersey Department of the Public Advocate by *Linda G. Rosenzweig*.

Court of Appeals' determination that any error in the admission of the psychiatrist's evidence in this case was irrelevant under the holding of *Zant* v. *Stephens*, 462 U. S. 862 (1983). On examination, however, we conclude that petitioner defaulted his underlying constitutional claim by failing to press it before the Supreme Court of Virginia on direct appeal. Accordingly, we decline to address the merits of petitioner's claims and affirm the judgment dismissing the petition for a writ of habeas corpus.

I

Following a jury trial, petitioner was convicted of the May 1977 murder of Audrey Weiler. According to his confession, petitioner encountered Ms. Weiler in a secluded area near his home and raped her at knifepoint. Fearing that her testimony could send him back to prison, he then grabbed her by the neck and choked her until she fell unconscious. When he realized that she was still alive, he dragged her into a nearby river, submerged her head, and repeatedly stabbed her with his knife. A subsequent medical examination indicated that the death was attributable to three clusters of lethal injuries: asphyxia from strangulation, drowning, and multiple stab wounds.

Prior to the trial, petitioner's appointed counsel, David Pugh, had explored the possibility of presenting a number of psychiatric defenses. Towards that end, Mr. Pugh requested that the trial court appoint a private psychiatrist, Dr. Wendell Pile, to conduct an examination of petitioner. Aware that psychiatric reports were routinely forwarded to the court and that such reports were then admissible under Virginia law, Mr. Pugh had advised petitioner not to discuss any prior criminal episodes with anyone. App. 134. See *Gibson* v. *Commonwealth*, 216 Va. 412, 219 S. E. 2d 845 (1975). Although that general advice was intended to apply to the forthcoming psychiatric examination, Mr. Pugh later testified that he "did not specifically tell [petitioner] not to say anything to Doctor Pile about the offense or any offenses." App. 132. During the course of the examination, Dr. Pile did in fact ask petitioner both about the murder and about prior incidents of deviant sexual conduct. Tr. of State Habeas Hearing 19. Although petitioner initially declined to answer, he later stated that he had once torn the clothes off a girl on a school bus before deciding not to carry out his original plan to rape her. App. 44. That information, together with a tentative diagnosis of "Sociopathic Personality; Sexual Deviation (rape)," was forwarded to the trial court, with copies sent both to Mr. Pugh and to the prosecutor who was trying the case for the Commonwealth. *Id.*, at 43–45. At no point prior to or during the interview did Dr. Pile inform petitioner that his statements might later be used against him or that he had the right to remain silent and to have counsel present if he so desired. *Id.*, at 90. Cf. *Estelle* v. *Smith*, 451 U. S. 454 (1981).

At the sentencing phase of the trial, the Commonwealth called Dr. Pile to the stand. Over the defense's objection, Dr. Pile described the incident on the school bus. Tr. 934–935. On cross-examination, he repeated his earlier conclusion that petitioner was a "sociopathic personality." *Id.*, at 936. After examining a second psychiatrist, the Commonwealth introduced petitioner's criminal record into evidence. It revealed that he had been convicted of rape in 1973 and had been paroled from the penitentiary on that charge less than four months prior to raping and murdering Ms. Weiler. The defense then called 14 character witnesses, who testified that petitioner had been a regular churchgoer, a member of the choir, a conscientious student in high school, and a good soldier in Vietnam. After lengthy deliberation, the jury recommended that petitioner be sentenced to death.

Petitioner appealed his conviction and sentence to the Supreme Court of Virginia. In his brief he raised 13 separate claims, including a broad challenge to the constitutionality of Virginia's death penalty provisions, objections to several of the trial court's evidentiary rulings, and a challenge to the exclusion of a prospective juror during *voir dire.* Petitioner did not, however, assign any error concerning the admission of Dr. Pile's testimony. At a subsequent state postconviction hearing, Mr. Pugh explained that he had consciously decided not to pursue that claim after determining that "Virginia case law would [not] support our position at that particular time." App. 143. Various objections to the Commonwealth's use of Dr. Pile's testimony were raised, however, in a brief filed by *amicus curiae* Post-Conviction Assistance Project of the University of Virginia Law School.

The Supreme Court of Virginia affirmed the conviction and sentence in all respects. *Smith* v. *Commonwealth,* 219 Va. 455, 248 S. E. 2d 135 (1978). In a footnote, it noted that, pursuant to a rule of the court, it had considered only those arguments advanced by *amicus* that concerned errors specifically assigned by the defendant himself. *Id.,* at 460, n. 1, 248 S. E. 2d, at 139, n. 1. Accordingly, it did not address any issues concerning the prosecution's use of the psychiatric testimony. This Court denied the subsequent petition for certiorari, which, again, did not urge the claim that admission of Dr. Pile's testimony violated petitioner's rights under the Federal Constitution. 441 U. S. 967 (1979).

In 1979, petitioner sought a writ of habeas corpus in the Circuit Court for the City of Williamsburg and the County of James City. For the first time since the trial, he argued that the admission of Dr. Pile's testimony violated his privilege against self-incrimination under the Fifth and Fourteenth Amendments to the Federal Constitution. The court ruled, however, that petitioner had forfeited the claim by failing to press it in earlier proceedings. At a subsequent evidentiary hearing, conducted solely on the issue of ineffective assistance of counsel, the court heard testimony concerning the reasons underlying Mr. Pugh's decision not to pursue the Fifth Amendment claim on appeal. On the basis of that testimony, the court found that Pugh and his assistant had researched the question, but had determined that the claim was unlikely to succeed. Thus, the court found, "counsel exercised reasonable judgment in deciding not to preserve the objection on appeal, and . . . this decision resulted from informed, professional deliberation." App. to Pet. for Cert. 71. Petitioner appealed the denial of his habeas petition to the Supreme Court of Virginia, contending that the Circuit Court had erred in finding that his objection to the admission of Dr. Pile's testimony had been defaulted. The Supreme Court declined to accept the appeal, *Smith* v. *Morris*, 221 Va. cxliii (1981), and we again denied certiorari. 454 U. S. 1128 (1981).

Having exhausted state remedies, petitioner sought a writ of habeas corpus in the United States District Court for the Eastern District of Virginia. In an unpublished order, the court denied the petition, holding that the objection to the admission of Dr. Pile's testimony was "clearly barred" under this Court's decision in *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). App. 158. In reaching that conclusion, the District Judge noted that "the default resulted not from the trial attorney's ignorance or inadvertence, but because of a deliberate tactical decision." *Ibid.*

The Court of Appeals for the Fourth Circuit affirmed, but on different grounds. *Smith* v. *Procunier*, 769 F. 2d 170 (1985). Finding it unnecessary to rely on procedural default or to address the merits of the substantive constitutional claim, the court held that admission of Dr. Pile's testimony, even if erroneous, could not be the basis for invalidating petitioner's sentence. It noted that the jury had relied on two distinct aggravating factors in its decision to recommend the death penalty. The psychiatric testimony, however, only bore on one of those factors, the likelihood that petitioner would "constitute a continuing serious threat to society." Va. Code § 19.2–264.2 (1983); Tr. 1102. In that circumstance, the Court of Appeals believed, our decision in *Zant* v. *Stephens*, 462 U. S., at 884, required the conclusion that the error, if any, was irrelevant to the overall validity of the sentence. We granted certiorari, *Smith* v. *Sielaff*, 474 U. S. 918 (1985), and now affirm on the authority of our decision in *Murray* v. *Carrier*, *ante*, p. 478.

II

Under Virginia law, failure to raise a claim on direct appeal from a criminal conviction ordinarily bars consideration of that claim in any subsequent state proceeding. See, *e. g.*, *Coppola* v. *Warden of Virginia State Penitentiary*, 222 Va. 369, 282 S. E. 2d 10 (1981); *Slayton* v. *Parrigan*, 215 Va. 27, 205 S. E. 2d 680 (1974). In the present case, the Virginia courts have enforced that rule by declining to consider petitioner's objection to the admission of Dr. Pile's testimony, a claim concededly not included in his initial appeal from his conviction and sentence. Consistent with our earlier intimations in *Reed* v. *Ross*, 468 U. S. 1, 11 (1984), we held in *Murray* v. *Carrier*, *ante*, p. 478, that a federal habeas court must evaluate appellate defaults under the same standards that apply when a defendant fails to preserve a claim at trial. Accordingly, although federal courts at all times retain the power to look beyond state procedural forfeitures, the exercise of that power ordinarily is inappropriate unless the defendant succeeds in showing both "cause" for noncompliance with the state rule and "actual prejudice resulting from the alleged constitutional violation." *Wainwright* v. *Sykes*, *supra*, at 84; *Murray* v. *Carrier*, *ante*, at 485. As we explained more fully in *Carrier*, this congruence between the standards for appellate and trial default reflects our judgment that concerns for finality and comity are virtually identical regardless of the timing of the defendant's failure to comply with legitimate state rules of procedure.

We need not determine whether petitioner has carried his burden of showing actual prejudice from the allegedly improper admission of Dr. Pile's testimony, for we think it self-evident that he has failed to demonstrate cause for his noncompliance with Virginia's procedures. We have declined in the past to essay a comprehensive catalog of the circumstances that would justify a finding of cause. *Reed* v. *Ross*, *supra*, at 13; see also *Wainwright* v. *Sykes*, *supra*, at 91. Our cases, however, leave no doubt that a deliberate, tactical decision not to pursue a particular claim is the very antithesis of the kind of circumstance that would warrant excusing a defendant's failure to adhere to a State's legitimate rules for the fair and orderly disposition of its criminal cases. As the Court explained in *Reed:*

> "[D]efense counsel may not make a tactical decision to forgo a procedural opportunity—for instance, to object at trial or to raise an issue on appeal—and then when he discovers that the tactic has been unsuccessful, pursue an alternative strategy in federal court. The encouragement of such conduct by a federal court on habeas corpus review would not only offend generally accepted principles of comity, but would undermine the accuracy and efficiency of the state judicial systems to the detriment of all concerned. Procedural defaults of this nature are, therefore, inexcusable, and cannot qualify as 'cause' for purposes of federal habeas corpus review." 468 U. S., at 14 (internal quotation and citation omitted).

Here the record unambiguously reveals that petitioner's counsel objected to the admission of Dr. Pile's testimony at trial and then consciously elected not to pursue that claim before the Supreme Court of Virginia. The basis for that decision was counsel's perception that the claim had little chance of success in the Virginia courts. With the benefit of hindsight, petitioner's counsel in this Court now contends that this perception proved to be incorrect. Cf. *Gibson* v. *Zahradnick*, 581 F. 2d 75 (CA4 1978) (repudiating reasoning of *Gibson* v. *Commonwealth*, 216 Va. 412, 219 S. E. 2d 845 (1975)). Even assuming that to be the case, however, a State's subsequent acceptance of an argument deliberately abandoned on direct appeal is irrelevant to the question whether the default should be excused on federal habeas.

Indeed, it is the very prospect that a state court "may decide, upon reflection, that the contention is valid" that undergirds the established rule that "perceived futility alone cannot constitute cause," *Engle* v. *Isaac*, 456 U. S. 107, 130, and n. 36 (1982); for "[a]llowing criminal defendants to deprive the state courts of [the] opportunity" to reconsider previously rejected constitutional claims is fundamentally at odds with the principles of comity that animate *Sykes* and its progeny. *Id.*, at 130.

Notwithstanding the deliberate nature of the decision not to pursue his objection to Dr. Pile's testimony on appeal—a course of conduct virtually dispositive of any effort to satisfy *Syke*'s "cause" requirement—petitioner contends that the default should be excused because Mr. Pugh's decision, though deliberate, was made in ignorance. Had he investigated the claim more fully, petitioner maintains, "it is inconceivable that he would have concluded that the claim was without merit or that he would have failed to raise it." Reply Brief for Petitioner 3.

The argument is squarely foreclosed by our decision in *Carrier*, which holds that "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." *Ante*, at 486–487. See also *Engle* v. *Isaac*, *supra*, at 133–134. Nor can it seriously be maintained that the decision not to press the claim on appeal was an error of such magnitude that it rendered counsel's performance constitutionally deficient under the test of *Strickland* v. *Washington*, 466 U. S. 668 (1984). *Carrier* reaffirmed that "the right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error . . . if that error is sufficiently egregious and prejudicial." *Ante*, at 496; see also *United States* v. *Cronic*, 466 U. S. 648, 657, n. 20 (1984). But counsel's deliberate decision not to pursue his objection to the admission of Dr. Pile's testimony falls far short of meeting that rigorous standard. After conducting a vigorous defense at both the guilt and sentencing phases of the trial, counsel surveyed the extensive transcript, researched a number of claims, and decided that, under the current state of the law, 13 were worth pursuing on direct appeal. This process of "winnowing out weaker arguments on appeal and focusing on" those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy. *Jones* v. *Barnes*, 463 U. S. 745, 751–752 (1983). It will often be the case that even the most informed counsel will fail to anticipate a state appellate court's willingness to reconsider a prior holding or will underestimate the likelihood that a federal habeas court will repudiate an established state rule. But, as *Strickland* v. *Washington* made clear, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U. S., at 689. Viewed in light of Virginia law at the time Mr. Pugh submitted his opening brief to the Supreme Court of Virginia, the decision not to pursue his objection to the admission of Dr. Pile's testimony fell well within the "wide range of professionally competent assistance" required under the Sixth Amendment to the Federal Constitution. *Id.*, at 690.

Nor can petitioner rely on the novelty of his legal claim as "cause" for noncompliance with Virginia's rules. See *Reed* v. *Ross*, 468 U. S., at 18 ("[W]here a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures"). Petitioner contends that this Court's decisions in *Estelle* v. *Smith*, 451 U. S. 454 (1981), and *Ake* v. *Oklahoma*, 470 U. S. 68 (1985), which were decided well after the affirmance of his conviction and sentence on direct appeal, lend support to his position that Dr. Pile's testimony should have been excluded.

But, as a comparison of *Reed* and *Engle* makes plain, the question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was "available" at all. As petitioner has candidly conceded, various forms of the claim he now advances had been percolating in the lower courts for years at the time of his original appeal. Brief for Petitioner 20–21, n. 12; Reply Brief for Petitioner 3. Moreover, in this very case, an *amicus* before the Supreme Court of Virginia specifically argued that admission of Dr. Pile's testimony violated petitioner's rights under the Fifth and Sixth Amendments. Brief for Post-Conviction Assistance Project of the University of Virginia Law School as *Amicus Curiae* in No. 780293, pp. 53–62. Under these circumstances, it simply is not open to argument that the legal basis of the claim petitioner now presses on federal habeas was unavailable to counsel at the time of the direct appeal.

We conclude, therefore, that petitioner has not carried his burden of showing cause for noncompliance with Virginia's rules of procedure. That determination, however, does not end our inquiry. As we noted in *Engle* and reaffirmed in *Carrier*, "'[i]n appropriate cases' the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" *Murray* v. *Carrier*, *ante*, at 495, quoting *Engle* v. *Isaac*, *supra*, at 135. Accordingly, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray* v. *Carrier*, *ante*, at 496.

We acknowledge that the concept of "actual," as distinct from "legal," innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense. Nonetheless, we think it clear on this record that application of the cause and prejudice test will not result in a "fundamental miscarriage of justice." *Engle*, 456 U. S., at 135. There is no allegation that the testimony about the school bus incident was false or in any way misleading. Nor can it be argued that the prospect that Dr. Pile might later testify against him had the effect of foreclosing meaningful exploration of psychiatric defenses. While that concern is a very real one in the abstract, here the record clearly shows that Dr. Pile did ask petitioner to discuss the crime he stood accused of committing as well as prior incidents of deviant sexual conduct. Although initially reluctant to do so, ultimately petitioner was forthcoming on both subjects. In short, the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones. Thus, even assuming that, as a legal matter, Dr. Pile's testimony should not have been presented to the jury, its admission did not serve to pervert the jury's deliberations concerning the ultimate question whether *in fact* petitioner constituted a continuing threat to society. Under these circumstances, we do not believe that refusal to consider the defaulted claim on federal habeas carries with it the risk of a manifest miscarriage of justice.

Nor can we concur in JUSTICE STEVENS' suggestion that we displace established procedural default principles with an amorphous "fundamental fairness" inquiry. *Post*, at 542–543. Precisely which parts of the Constitution are "fundamental" and which are not is left for future elaboration. But, for JUSTICE STEVENS, when a defendant in a capital case raises a "substantial, colorable" constitutional claim, a federal court should entertain it no matter how egregious the violation of state procedural rules, and regardless of the fairness of the opportunity to raise that claim in the course of his trial and appeal. *Post*, at 546. We reject the suggestion that the principles of *Wainwright* v. *Sykes* apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws. We similarly reject the suggestion that there is anything "fundamentally unfair" about enforcing procedural default rules in cases devoid of any substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination. In view of the profound societal costs that attend the exercise of habeas jurisdiction, such exercise "carries a serious burden of justification." H. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 146 (1970); see also *Engle* v. *Isaac*, *supra*, at 126–129. When the alleged error is unrelated to innocence, and when the defendant was represented by competent counsel, had a full and fair opportunity to press his claim in the state system, and yet failed to do so in violation of a legitimate rule of procedure, that burden has not been carried.

Accordingly, we affirm the judgment of the Court of Appeals upholding the dismissal of petitioner's application for a writ of habeas corpus.

Affirmed.

[For dissenting opinion of JUSTICE BRENNAN, see *ante*, p. 516.]

JUSTICE STEVENS, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join and with whom JUSTICE BRENNAN joins as to Parts II and III, dissenting.

The record in this case unquestionably demonstrates that petitioner's constitutional claim is meritorious, and that there is a significant risk that he will be put to death *because* his constitutional rights were violated.

The Court does not take issue with this conclusion. It is willing to assume that (1) petitioner's Fifth Amendment right against compelled self-incrimination was violated; (2) his Eighth Amendment right to a fair, constitutionally sound sentencing proceeding was violated by the introduction of the evidence from that Fifth Amendment violation; and (3) those constitutional violations made the difference between life and death in the jury's consideration of his fate. Although the constitutional violations and issues were sufficiently serious that this Court decided to grant certiorari, and although the Court of Appeals for the Fourth Circuit decided the issue on the merits, this Court concludes that petitioner's presumably meritorious constitutional claim is procedurally barred and that petitioner must therefore be executed.

In my opinion, the Court should reach the merits of petitioner's argument. To the extent that there has been a procedural "default," it is exceedingly minor—perhaps a kind of "harmless" error. Petitioner's counsel raised a timely objection to the introduction of the evidence obtained in violation of the Fifth Amendment. A respected friend of the Court—the University of Virginia Law School's Post-Conviction Assistance Project—brought the issue to the attention of the Virginia Supreme Court in an extensive *amicus curiae* brief. Smith's counsel also raised the issue in state and federal habeas corpus proceedings, and, as noted, the Court of Appeals decided the case on the merits. Consistent with the well-established principle that appellate arguments should be carefully winnowed,[1] however, Smith's counsel did not raise the Fifth Amendment issue in his original appeal to the Virginia Supreme Court—an unsurprising decision in view of the fact that a governing Virginia Supreme Court precedent, which was then entirely valid and only two years old, decisively barred the claim.[2]

Nevertheless, the Court finds the lawyer's decision not to include the constitutional claim "virtually dispositive." *Ante*, at 535. The Court offers the remarkable explanation that "[u]nder these circumstances"—in which petitioner's death penalty will stand despite serious Fifth and Eighth Amendment violations that played a critical role in the determination that death is an appropriate penalty—"we do not believe that refusal to consider the defaulted claim on federal habeas carries with it the risk of a manifest miscarriage of justice." *Ante*, at 538.

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[1] See *Jones* v. *Barnes*, 463 U. S. 745, 751–752 (1983); *ante*, at 536.

[2] See *Gibson* v. *Commonwealth*, 216 Va. 412, 219 S. E. 2d 845 (1975), cert. denied, 425 U. S. 994 (1976).

I fear that the Court has lost its way in a procedural maze of its own creation and that it has grossly misevaluated the requirements of "law and justice" that are the federal court's statutory mission under the federal habeas corpus statute.[3] To understand the nature of the Court's error, it is necessary to assess the Court's conclusion that the claim is procedurally defaulted; to consider the Fifth Amendment violation; and to consider the Eighth Amendment violation.

I

We begin with the common ground. The historic office of the Great Writ as the ultimate protection against fundamental unfairness is well known.[4] That mission is reflected in the statutory requirement that the federal court "dispose of the matter as law and justice require." 28 U. S. C. § 2243. It is by now equally clear that the application of the Court's "cause and prejudice" formulation as a rigid bar to review of fundamental constitutional violations has no support in the statute, or in Federal Rule of Criminal Procedure 12 (b)(2), from which it was initially imported;[5] the standard thus represents judicial lawmaking of the most unabashed form. The Court nonetheless reaffirms today, as it has consistently held in the past,[6] that federal courts retain the

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[3] See 28 U. S. C. § 2243 ("The court shall . . . dispose of the matter as law and justice require").

[4] See, *e. g.*, *Engle* v. *Isaac*, 456 U. S. 107, 126 (1982) ("The writ of habeas corpus indisputably holds an honored position in our jurisprudence. . . . Today, as in prior centuries, the writ is a bulwark against convictions that violate 'fundamental fairness' ").

[5] See *Murray* v. *Carrier*, *ante*, at 501–505 (STEVENS, J., concurring in judgment). Indeed, the Court in *Murray* conceded that "[t]he cause and prejudice test may lack a perfect historical pedigree," *ante*, at 496, and noted that "the Court acknowledged as much in *Wainwright* v. *Sykes*." *Ibid.*

[6] See, *e. g.*, *Reed* v. *Ross*, 468 U. S. 1, 9 (1984); *Francis* v. *Henderson*, 425 U. S. 536, 538 (1976); *Fay* v. *Noia*, 372 U. S. 391, 398–399 (1963).

power to entertain federal habeas corpus requests despite the absence of "cause and prejudice," *ante*, at 537; the only question is whether to exercise that power. Despite the rigor of its cause-and-prejudice standard, moreover, the Court continues to commit itself to maintaining the availability of habeas corpus under certain circumstances, even in the absence of "cause," *ibid.;* indeed, this Term, the Court has emphasized the importance of that availability by remanding a case to consider the merits of a prisoner's claim even though the prisoner failed to show "cause" for the default. *Murray* v. *Carrier*, *ante*, p. 478.

The Court concludes in this case that no miscarriage of justice will result from a refusal to entertain Smith's challenge to his death sentence. This conclusion is flawed in three respects. First, the Court mistakenly assumes that only a claim implicating "actual innocence" rises to the level of a miscarriage of justice. Second, the Court does not properly assess the force of a claim that a death penalty is invalid. Finally, the Court vastly exaggerates the state interest in refusing to entertain this claim.

The Court accurately quotes the holding in *Murray* v. *Carrier:* "'[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.'" *Ante*, at 537. The Court then seeks to transfer this "actual innocence" standard to capital sentencing proceedings, and concludes that, in petitioner's sentencing hearing, "the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones." *Ante*, at 538. The Court does not explain, however, why *Carrier*'s clearly correct holding about the propriety of the writ in a case of innocence must also be a *limiting* principle on the federal court's ability to exercise its statutory authority to entertain federal habeas corpus actions; more specifically, the Court does not explain why the same principle should not apply when a constitutional violation is claimed to have resulted in a lack of fundamental fairness, either in a conviction or in a death sentence.

This analysis is far removed from the traditional understanding of habeas corpus. For instance, in *Moore* v. *Dempsey*, 261 U. S. 86 (1923), the Court considered a claim that the murder convictions and death sentences of five black defendants were unconstitutional. The Federal District Court had dismissed the writ of habeas corpus. In his opinion for the Court, Justice Holmes explained that in view of the allegations—systematic exclusion of blacks from the jury and threatened mob violence—the Federal District Court should not have dismissed the writ without considering the factual allegations. The Court noted the presence of a clear procedural default—the Arkansas Supreme Court had refused to entertain the challenge to discrimination in the jury because the objection "came too late." *Id.*, at 91. The Court nevertheless held that the Federal District Court should have entertained the petition. *Id.*, at 92.

Although the allegations clearly implicated questions about the accuracy of the truth-finding process, the Court's opinion cannot be fairly read to rest on the kind of "innocence" inquiry that the Court propounds today. For the Court specifically rejected the notion that its inquiry into the presence of a serious constitutional violation was actually an inquiry into the guilt or innocence of the petitioners: "The petitioners say that [the victim] must have been killed by other whites [rather than by the black petitioners], but that we leave on one side *as what we have to deal with is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved.*" *Id.*, at 87–88 (emphasis added). Today, the Court adopts the converse of Justice Holmes' proposition: it leaves to one side the question whether constitutional rights have been preserved, and considers only petitioner's innocence or guilt.[7]

The majority's reformulation of the traditional understanding of habeas corpus appears to be premised on the notion that only constitutional violations which go to guilt or innocence are sufficiently serious to implicate the "fundamental fairness" alluded to in *Engle* v. *Isaac*, 456 U. S. 107, 126 (1982).[8] If accuracy in the determination of guilt or innocence were the only value of our criminal justice system, then the Court's analysis might have a great deal of force. If accuracy is the only value, however, then many of our constitutional protections—such as the Fifth Amendment right against compelled self-incrimination and the Eighth Amendment right against cruel and unusual punishment, the very claims asserted by petitioner—are not only irrelevant, but possibly counterproductive.[9] Our Constitution, however, and our decision to adopt an "accusatorial," rather than an "inquisitorial" system of justice,[10] reflect a different choice. That choice is to afford the individual certain protections—the right against compelled self-incrimination and the right against cruel and unusual punishment among them—even if those rights do not necessarily implicate the accuracy of the truth-finding proceedings. Rather, those protections are an aspect of the fundamental fairness, liberty, and individual dignity that our society affords to all, even those charged with heinous crimes.

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[7] In doing so, the Court goes a long way toward eliminating the distinction, in procedural default cases, between the request for habeas relief and the ultimate issue for a trial court—a distinction that has long been central to our understanding of the Great Writ. See, *e. g.*, *Ex parte Bollman*, 4 Cranch 75, 101 (1807) (Marshall, C. J.) ("It has been demonstrated at the bar, that the question brought forward on a *habeas corpus*, is always distinct from that which is involved in the cause itself. The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separated, and may be decided in different courts").

[8] See n. 4, *supra*.

[9] Expressing this view, William Howard Taft once observed that, precisely because of the central value of accuracy in guilt or innocence determinations, the Fifth Amendment might have been ill advised. See Taft, The Administration of Criminal Law, 15 Yale L. J. 1, 8 (1905) ("When examined as an original proposition, the prohibition that the defendant in a criminal case shall not be compelled to testify seems, in some aspects, to be of doubtful utility. If the administration of criminal law is for the purpose of convicting those who are guilty of crime, then it seems natural to follow in such a process the methods that obtain in ordinary life").

In my opinion, then, the Court's exaltation of accuracy as the only characteristic of "fundamental fairness" is deeply flawed. Our criminal justice system, and our Constitution, protect other values in addition to the reliability of the guilt or innocence determination, and the statutory duty to serve "law and justice" should similarly reflect those values.

Thus, the Court begins with a conception of "fundamental fairness" that is far too narrow and that conflicts with the nature of our criminal justice system. The Court similarly fails to give appropriate weight to the fact that capital punishment is at stake in this case. It is now well settled that "death is a different kind of punishment from any other which may be imposed in this country." *Gardner* v. *Florida*, 430 U. S. 349, 357 (1977) (STEVENS, J.).[11] It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, the consequence of scrupulously fair procedures. When a condemned prisoner raises a substantial, colorable Eighth Amendment violation, there is a special obligation, consistent with the statutory mission to "dispose of the matter as law and justice require," to consider whether the prisoner's claim would render his sentencing proceeding fundamentally unfair. Indeed, it was precisely this concern that prompted the Court of Appeals to consider petitioner's argument on the merits: "[W]e give weight to the consideration that we have before us a matter of life and death. The imminent execution of Smith serves as sufficient grounds to review the issue." *Smith* v. *Procunier*, 769 F. 2d 170, 172 (1985).

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[10] See *Moran* v. *Burbine*, 475 U. S. 412, 434, and n. 1 (1986) (STEVENS, J., dissenting); *Miller* v. *Fenton*, 474 U. S. 104, 110 (1985); *Malloy* v. *Hogan*, 378 U. S. 1, 7–8 (1964); *Rogers* v. *Richmond*, 365 U. S. 534, 540–541 (1961); *Bram* v. *United States*, 168 U. S. 532, 543–545 (1897).

[11] See also *California* v. *Ramos*, 463 U. S. 992, 998–999 (1983) ("The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination"); *Zant* v. *Stephens*, 462 U. S. 862, 884 (1983) ("[T]here is a qualitative difference between death and any other permissible form of punishment"); *Rummel* v. *Estelle*, 445 U. S. 263, 272 (1980) ("This theme, the unique nature of the death penalty for purposes

Finally, as in every habeas corpus decision, the magnitude of the State's interest must be considered. In this case, sev-

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of Eighth Amendment analysis, has been repeated time and time again in our opinions. . . . [A] sentence of death differs in kind from any sentence of imprisonment"); *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978) (BURGER, C. J.) ("[T]he imposition of death by public authority is . . . profoundly different from all other penalties"). Cf. Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128, 1222 (1986) ("[W]hen a capital defendant raises a nonfrivolous constitutional question, neither state nor federal courts should be free to refuse to decide it simply because it was not raised in accordance with state procedural requirements. Rather, federal law should expressly provide that in matters of procedural default, as in other matters, death is different").

Indeed, the Court has recognized that even the *threat* of a death penalty may, in certain circumstances, exert a special pull in favor of the exercise of the federal court's undisputed statutory power to entertain a habeas corpus writ on a claim that was procedurally defaulted. In *Fay* v. *Noia*, 372 U. S., at 440, the Court was willing to excuse Noia's deliberate decision not to appeal because Noia perceived that a death sentence might result: "His was the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence." See also *Wainwright* v. *Sykes*, 433 U. S. 72, 83 (1977) (emphasizing Noia's "'grisly choice' between acceptance of his life sentence and pursuit of an appeal which might culminate in a sentence of death").

eral factors suggest that the State's interest is not adequate to obstruct federal habeas corpus consideration of petitioner's claim. First, petitioner made a timely objection at trial, and the state interest in enforcing procedural default rules at trial is far greater than the State's interest in enforcing procedural default rules on appeal.[12] Second, the issue was raised before the state court in an *amicus curiae* brief.[13] Since this is a matter on which courts ordinarily may exercise discretion,[14] the discretionary decision not to address the issue hardly rises to a state interest of sufficient magnitude that a man should die even though his Fifth and Eighth Amendment rights were violated to achieve that objective. Third, the issue was presented to the state courts in state habeas proceedings—*after* the precedent blocking petitioner's claim had been repudiated[15]—and the state habeas court, while finding that the decision by Smith's counsel not to raise the issue with a governing Virginia precedent squarely against him was entirely reasonable,[16] concluded that the Fifth Amendment claim was procedurally barred and thus did not address it.[17] Fourth, the Court of Appeals for the Fourth Circuit addressed the merits and did not rest on any notion of procedural default; this Court customarily defers to federal courts of appeals on questions of state law,[18] including questions about "cause" for failure to comply with state procedural rules.[19] Finally, and most importantly, the inadequacy of the state interest in this death penalty context is decisively shown by the prevailing practice in many States that appellate courts have a special duty in capital cases to overlook procedural defaults and review the trial record for reversible error, before affirming that most severe of all sentences.[20]

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[12] See *Murray* v. *Carrier*, *ante*, at 506–515 (STEVENS, J., concurring in judgment); Meltzer, *supra*, at 1223–1225; Note, Procedural Defaults at the Appellate Stage and Federal Habeas Corpus Review, 38 Stan. L. Rev. 463 (1986).

[13] See Brief for Post-Conviction Assistance Project of the University of Virginia Law School as *Amicus Curiae* in No. 780293, pp. 56–61 (arguing that the Fifth Amendment required suppression of psychiatrist's testimony).

[14] Cf. *Mapp* v. *Ohio*, 367 U. S. 643, 646, n. 3 (1961) (addressing issue raised by *amicus*); *Schwinden* v. *Burlington Northern, Inc.*, —— Mont. ——, ——, 691 P. 2d 1351, 1358 (1984) ("We determine here not to follow the usual rule that issues raised by amici that are part of the underlying action will not be considered by this Court").

[15] See *Gibson* v. *Zahradnick*, 581 F. 2d 75 (CA4) (holding that the *Gibson* v. *Commonwealth* analysis violates Constitution and that writ of habeas corpus should issue), cert. denied, 439 U. S. 996 (1978). In fact, although the Court of Appeals for the Fourth Circuit decided *Gibson* after the briefs in petitioner's case had been filed, the *Gibson* opinion was issued *before* the initial Virginia Supreme Court opinion refusing to address the issue.

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[16] See state habeas opinion, App. 147 ("[B]oth *Gibson* v. *Zahradnick* and *Smith* v. *Estelle* were decided after petitioner's trial. Thus, regardless of their usefulness in theory to sustain an appeal, neither was in fact available to counsel when needed. . . . In light of these facts and of the differences noted above, I find sufficient reason for counsel not to have raised on appeal the arguments presented here. I thus conclude that counsel exercised reasonable judgment in deciding not to preserve the objection on appeal").

[17] State habeas order, Record 204 (Fifth Amendment issue "was waived and forfeited and cannot now be considered").

[18] See, *e. g.*, *Pembaur* v. *Cincinnati*, 475 U. S. 469, 484–485, n. 13 (1986); *Regents of University of Michigan* v. *Ewing*, 474 U. S. 214, 224, n. 10 (1985); *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U. S. 797, 815, n. 12 (1984); *Bishop* v. *Wood*, 426 U. S. 341, 345–347 (1976); *Propper* v. *Clark*, 337 U. S. 472, 486–487 (1949).

[19] See *Jenkins* v. *Anderson*, 447 U. S. 231, 234, n. 1 (1980) ("The applicability of the *Sykes* 'cause'-and-'prejudice' test may turn on an interpretation of state law. . . . This Court's resolution of such a state-law question would be aided significantly by views of other federal courts that may possess greater familiarity with [state] law"); *Rummel* v. *Estelle*, 445 U. S., at 267, n. 7 ("Deferring to the Court of Appeals' interpretation of Texas law, we decline to hold that *Wainwright* bars Rummel from presenting his claim").

[20] See, *e. g.*, Ala. Rule App. Proc. 39(k) ("In all cases in which the death penalty has been imposed, . . . the supreme court may notice any plain error or defect in the proceeding under review, whether or not brought to

Thus, the Court is mistaken in its narrow definition of fundamental fairness, in its failure to appreciate the significance of a challenge to a death penalty, and in its exaggeration of

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the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial rights of the petitioner"); Arkansas Rev. Stat. Ann. § 43-2725 (1977) ("[W]here either a sentence for life imprisonment or death [is present], the Supreme Court shall review all errors prejudicial to the rights of the appellant"); *Cave* v. *State*, 476 So. 2d 180, 183, n. 1 (Fla. 1985) (In capital cases, "[w]e will, of course, continue to review every issue presented and to conduct our own review in accordance with Florida Rule of Appellate Procedure 9.140(f)"); Georgia Unified Appeal Rule IV B(2) (In capital cases, "[t]he Supreme Court shall review each of the assertions of error timely raised by the defendant during the proceedings in the trial court regardless of whether or not an assertion of error was presented to the trial court by motion for new trial, and regardless of whether error is enumerated in the Supreme Court"); *State* v. *Osborn*, 102 Idaho 405, 410–411, 631 P. 2d 187, 192–193 (1981) ("Death is clearly a different kind of punishment from any other that [might] be imposed, and [Idaho Code] § 19–2827 mandates that we examine not only the sentence but the procedure followed in imposing that sentence regardless of whether an appeal is even taken. This indicates to us that we may not ignore unchallenged errors. Moreover, the gravity of a sentence of death and the infrequency with which it is imposed outweighs any rationale that might be proposed to justify refusal to consider errors not objected to below"); *People* v. *Holman*, 103 Ill. 2d 133, 176, 469 N. E. 2d 119, 140 (1984) ("Ordinarily, a contention not made in the trial court is waived on appeal. . . . However, because of the qualitative difference between death and other forms of punishment . . . this court has elected to address errors in death penalty cases which might have affected the decision of the sentencing jury"), cert. denied, 469 U. S. 1220 (1985); *Lowery* v. *State*, 478 N. E. 2d 1214, 1229 (Ind. 1985) ("The failure to properly raise issues in the Motion to Correct Errors generally results in a waiver of the claimed errors. . . . Since the death penalty was imposed in this case, however, we will review the state of the record concerning these questions"); *Ice* v. *Commonwealth*, 667 S. W. 2d 671, 674 (Ky. 1984) ("[I]n a death penalty case every prejudicial error must be considered, whether or not an objection was made in the trial court"), cert. denied, 469 U. S. 860 (1984); *State* v. *Hamilton*, 478 So. 2d 123, 127, n. 7 (La. 1985) ("In death penalty cases, this court has reviewed assignments of error, despite the absence of a contemporaneous objection, in order to determine whether the error 'render[ed] the result unreliable,' the State's interest in refusing to entertain a claim that was raised at trial, on appeal by an *amicus*, and in state habeas proceedings; that was addressed on the merits by the Court of Appeals (and briefed and argued on the merits in this Court); and that must be assumed to make the difference between life and death. Because I disagree with the Court's evaluation of these matters, I would address the merits of petitioner's argument that constitutional violations render his sentence of death fundamentally unfair.

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thus avoiding later consideration of the error in the context of ineffective assistance of counsel"); *State* v. *Nave*, 694 S. W. 2d 729, 735 (Mo. 1985) ("Several states hold that the general rule that allegations of court error not assigned in a motion for new trial are not preserved for appellate review, codified in Missouri Rule 29.11(d) with exceptions not applicable here, is inapplicable in death penalty cases. Even though the assignment of error has been improperly preserved, we review, ex gratia, the point relied on for plain error . . . to determine if manifest injustice or a miscarriage of justice resulted from the denial of Nave's request for continuance"); *Commonwealth* v. *McKenna*, 476 Pa. 428, 440–441, 383 A. 2d 174, 181 (1978) ("Because imposition of the death penalty is irrevocable in its finality, it is imperative that the standards by which that sentence is fixed be constitutionally beyond reproach. . . . The waiver rule cannot be exalted to a position so lofty as to require this Court to blind itself to the real issue—the propriety of allowing the state to conduct an illegal execution"); *State* v. *Patterson*, 278 S. C. 319, 320–321, 295 S. E. 2d 264, 264–265 (1982) ("On appeal from a murder conviction in which the death penalty is imposed, this Court reviews the entire record for prejudicial error *in favorem vitae*, regardless of whether the error was properly preserved for review"); *State* v. *Brown*, 607 P. 2d 261, 265 (Utah 1980) ("[N]o objection was made to the omission. Nevertheless, as this is a capital case, we consider the defendant's contention on appeal").

Indeed, Virginia law itself recognizes the special obligations attendant on reviewing death penalties by providing for automatic Virginia Supreme Court review of the death penalty, Va. Code § 17–110.1A (1982), and giving capital cases priority on the court's docket, § 17–110.2. Some State Supreme Courts interpret such statutes to impose an obligation on the court to review the transcript for all possible errors. See, *e. g.*, *State* v. *Osborn, supra.*

II

The introduction of petitioner's comments to the court-appointed psychiatrist clearly violated the Fifth Amendment. As the majority points out, psychiatric reports by court-appointed psychiatrists "were routinely forwarded to the court and . . . were then admissible under Virginia law." *Ante*, at 529. However, "[a]t no point prior to or during the interview did Dr. Pile inform petitioner that his statements might later be used against him or that he had the right to remain silent and to have counsel present if he so desired." *Ante*, at 530. Moreover, the court-appointed psychiatrist related petitioner's description of an earlier sexual assault in a letter to the court and to the prosecution, as well as to the defense, and testified about the description, at the State's request, at petitioner's capital sentencing hearing. The State thus relied on Dr. Pile's testimony as evidence of "future dangerousness," one of the two aggravating circumstances found by the jury to justify a sentence of death.[21]

CHIEF JUSTICE BURGER's opinion for the Court in *Estelle* v. *Smith*, 451 U. S. 454 (1981), makes it absolutely clear that the introduction of this evidence by the prosecution at the sentencing stage violated the Fifth Amendment. As THE CHIEF JUSTICE explained, the Fifth Amendment fully applies to a capital sentencing proceeding: "Just as the Fifth Amendment prevents a criminal defendant from being made '"the deluded instrument of his own conviction,"' *Culombe* v. *Connecticut*, 367 U. S. [568,] 581, quoting 2 W. Hawkins, Pleas of the Crown 595 (8th ed. 1824), it protects him as well from being made 'the deluded instrument' of his own execution." *Id.*, at 462. As THE CHIEF JUSTICE also explained, prosecutorial use of evidence from a psychiatric interrogation in a capital sentencing proceeding requires the protections, and warnings, accorded the Fifth Amendment right in other contexts: "Because [the defendant] did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to [the psychiatrist] to establish his future dangerousness." *Id.*, at 468.

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[21] See Prosecutor's Closing Argument at Sentencing Phase, App. 30–31 ("Now, as I said, you all, the Court has instructed you that you all may fix his punishment at death, if the Commonwealth proved its case—proved the prior history that he would commit criminal acts of violence that would constitute a continuous serious threat to society. Now, what has the Commonwealth proved? The Commonwealth has proved that prior to the crime you all convicted him of yesterday, that he assaulted a person on the bus. He said he did it. . . . Tore her clothes off, and then decided not to do it").

Thus, the use of petitioner's statements clearly violated the Fifth Amendment.[22] In view of the majority's willingness to assume that the constitutional violation is present but that the failure to address it does not affect the fundamental fairness of petitioner's sentence, moreover, it is instructive to recall the importance of the Fifth Amendment right at issue. Again, THE CHIEF JUSTICE's opinion in *Estelle* v. *Smith* provides guidance:

> "*Miranda* held that 'the prosecution may not use statements, whether exculpatory or inculpatory stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.' . . . The purpose of these admonitions is to combat what the Court saw as 'inherently compelling pressures' at work on the person and to provide him with an awareness of the Fifth Amendment privilege and the consequences of forgoing it, which is the prerequisite for 'an intelligent decision as to its exercise.'
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> . . . . .

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[22] The state trial court's rejection of petitioner's trial objection to the psychiatrist's testimony stands in sharp contrast to THE CHIEF JUSTICE's *Estelle* analysis: "I don't believe that Doctor Pile has any duty to inform him that anything he may say to him may be used for or against him in a Court of Law, as a police officer does under the Miranda." App. 5.

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> "The Fifth Amendment privilege is 'as broad as the mischief against which it seeks to guard,' *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892), and the privilege is fulfilled only when a criminal defendant is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty . . . for such silence.' *Malloy* v. *Hogan*, 378 U. S., at 1, 8 (1964)." *Id.*, at 466–468.

Given the historic importance of the Fifth Amendment, and the fact that the violation of this right made a significant difference in the jury's evaluation of petitioner's "future dangerousness" (and consequent death sentence), it is not only proper, but imperative, that the federal courts entertain petitioner's entirely meritorious argument that the introduction of the psychiatrist's testimony at his sentencing hearing violated that fundamental protection.[23]

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[23] The State argues that petitioner's case is distinguishable from *Estelle* because the defense requested the psychiatric examination. In view of the fact that Dr. Pile related the account to the prosecution and the court, and testified for the prosecution, he was quite clearly an "agent of the State" in the same sense in which the psychiatrist in *Estelle* was an agent of the State. See 451 U. S., at 467 ("When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting").

Petitioner and *amici*, in turn, argue that, because the examination was to assist the defense, an absolute guarantee of confidentiality, rather than *Miranda* warnings, should have been required. They contend that such confidentiality is especially important to effectuate the due process right to consult with a psychiatrist that was recognized in *Ake* v. *Oklahoma*, 470 U. S. 68 (1985). Since, at a minimum, *Estelle* required that Dr. Pile give *Miranda* warnings, we need not consider the possibility that disclosure would have been inappropriate in any circumstances. For it is at least clear that, under *these* circumstances, his testimony violated petitioner's Fifth Amendment right. Moreover, we need not decide whether, under these circumstances, in which the psychiatrist may have actually been act-

III

It is also quite clear that the introduction of the evidence violated his Eighth Amendment right to a fair sentencing proceeding. In this respect, I disagree with the Court of Appeals' reading of the opinion that I authored for the Court in *Zant* v. *Stephens*, 462 U. S. 862 (1983). The Court of Appeals concluded that, because the jury also found an aggravating circumstance of "vileness," the death sentence could stand even if Dr. Pile's testimony represented a flagrant Fifth Amendment violation.

In *Zant*, we held that the Georgia Supreme Court's invalidation of one of the three aggravating circumstances found by the jury did not require that the death penalty be set aside. But that conclusion was reached only after we satisfied ourselves that the evidence relating to the invalid aggravating circumstance had been properly admitted.[24] We

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ing as an agent of the defense, his transformation into an agent of the State was itself constitutionally invalid under the Sixth Amendment.

[24] "But the invalid aggravating circumstance found by the jury in this case was struck down in *Arnold* because the Georgia Supreme Court concluded that it fails to provide an adequate basis for distinguishing a murder case in which the death penalty may be imposed from those cases in which such a penalty may not be imposed. See nn. 5 and 16, *supra*. *The underlying evidence is nevertheless fully admissible at the sentencing phase*. . . .

. . . . .

"Thus, any evidence on which the jury might have relied in this case to find that respondent had previously been convicted of a substantial number of serious assaultive offenses, as he concedes he has been, was properly adduced at the sentencing hearing and was fully subject to explanation by the defendant." 462 U. S., at 886–887 (emphasis added).

We continued:

"Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality. We accept that court's view that the subsequent invalidation of one of several statutory aggravating circumstances does not automatically require reversal of the death penalty, having been assured that a death sentence will be set aside if the invalidation of an aggravating circumstance makes the penalty arbitrary and capricious. 250 Ga., at 101, did not conclude, as the Court of Appeals seems to have assumed, that any evidence concerning the invalid circumstance was simply irrelevant because the valid circumstances were, in all events, sufficient to support the death penalty. The fact that the record adequately establishes one valid aggravating circumstance may make the defendant eligible for the death penalty but it does not justify the conclusion that a death sentence should stand even though highly prejudicial inadmissible evidence was presented to the jury at the sentencing hearing. The introduction of such highly prejudicial, inadmissible evidence—evidence that itself represents an independent constitutional violation—quite clearly undermines the validity of the capital sentencing proceeding and violates the Eighth Amendment.

IV

Thus, I would not only reach the merits of petitioner's constitutional claim but also would conclude that it has merit. The question that remains is the one the Court addresses in the last two paragraphs of its opinion—whether the constitutional error warrants the conclusion that the death penalty should be set aside in this habeas corpus proceeding. I think that question should be answered by reference to the language of the governing statute—the writ should issue "as law and justice require." To hold, as the Court does today, that petitioner's death sentence must stand despite the fact that blatant constitutional violations presumably made the difference between the jury's recommendation of life or death, violates not only "law," but, quite clearly, "justice" as well.

I respectfully dissent.

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297 S. E. 2d, at 4. The Georgia Supreme Court, in its response to our certified question, expressly stated: 'A different result might be reached in a case where evidence was submitted in support of a statutory aggravating circumstance *which was not otherwise admissible* and thereafter the circumstance failed.' *Ibid.*" *Id.*, at 890 (emphasis added).

UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS *v.* GALIOTO

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

No. 84-1904. Argued March 26, 1986—Decided June 27, 1986

Appellee, who had been involuntarily committed to a mental hospital for a period of several days in 1971, was unable to purchase a firearm from a store in 1982 because of the provisions of 18 U. S. C. § 922(d) prohibiting sales of firearms to such persons. Section 922(d) and other federal statutes prohibiting persons who have been committed to mental institutions from possessing, receiving, or transporting firearms also apply to felons. However, under 18 U. S. C. § 925(c), certain felons could apply to the Bureau of Alcohol, Tobacco and Firearms for administrative relief from the disabilities imposed by federal firearms laws, but no such relief was permitted for former mental patients. After unsuccessfully seeking a special exemption from the Bureau, appellee brought suit in Federal District Court, challenging the constitutionality of the firearms legislation. The court held that the statutory scheme was unconstitutional as violating equal protection principles because there was no rational basis for singling out mental patients for permanent disabled status, particularly as compared to convicts. The court also concluded that the statutory scheme unconstitutionally created an "irrebuttable presumption" that one who has been committed, no matter what the circumstances, is forever mentally ill and dangerous.

Held: The equal protection and "irrebuttable presumption" issues are now moot because, after this Court noted probable jurisdiction over this appeal and heard arguments, Congress amended § 925(c) to afford the administrative remedy contained therein to former mental patients ineligible to purchase firearms. Since appellee's complaint appears to raise other issues best addressed in the first instance by the District Court, the case is remanded for further proceedings. Pp. 559-560.

602 F. Supp. 682, vacated and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

Charles A. Rothfeld argued the cause for appellant. With him on the briefs were *Solicitor General Fried, Assistant*

Attorney General Willard, Deputy Solicitor General Geller, and *Nicholas S. Zeppos.*

Michael A. Casale argued the cause and filed a brief for appellee.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We noted probable jurisdiction to decide whether Congress may, consistent with the Fifth Amendment, forbid all involuntarily committed former mental patients to purchase firearms while permitting some felons to do so.

In 1982 appellee attempted to purchase a firearm at Ray's Sport Shop in North Plainfield, New Jersey. The Sport Shop gave appellee a standard questionnaire, which asked, *inter alia:* "Have you ever been adjudicated mentally defective or have you ever been committed to a mental institution?" Appellee had been involuntarily committed to a mental hospital for a period of several days in 1971, and accordingly answered "yes" to this question. The store then refused to sell him a gun by reason of 18 U. S. C. § 922(d)(4), which makes it unlawful for a licensed dealer in firearms "to sell . . . any firearm . . . to any person knowing or having reasonable cause to believe that such person . . . has been adjudicated as a mental defective or had been committed to any mental institution." Federal firearms laws also forbid "any person . . . who has been adjudicated as a mental defective or who has been committed to a mental institution . . . to ship or transport any firearm or ammunition in interstate or foreign commerce," 18 U. S. C. § 922(g), or to "receive any firearm or ammunition which has been shipped or transported in in-

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*Briefs of *amici curiae* urging affirmance were filed for the American Psychological Association by *Margaret Farrell Ewing, Donald N. Bersoff,* and *Arlene S. Kanter;* for the Coalition for the Fundamental Rights and Equality of Ex-Patients by *Richard E. Gardiner* and *Robert Dowlut;* and for the New Jersey Department of the Public Advocate, Division of Mental Health Advocacy, et al. by *Linda G. Rosenzweig, Penelope A. Boyd,* and *Peter Margulies.*

terstate or foreign commerce," § 922(h). Partially overlapping provisions of 18 U. S. C. App. §§ 1202(a)(1) and (3) prohibit any person who has "been adjudged by a court . . . of being mentally incompetent" from receiving, possessing, or transporting firearms.

After unsuccessfully seeking a special exemption from the Bureau of Alcohol, Tobacco and Firearms, appellee brought suit in the United States District Court for the District of New Jersey, challenging the constitutionality of the firearms legislation. The District Court concluded that those portions of the federal firearms statutes that deprived appellee of his ability to purchase a firearm were constitutionally infirm. 602 F. Supp. 682, 683 (1985). Both felons and persons who have been committed to mental institutions, *inter alia*, are subject to the firearms disabilities contained in 18 U. S. C. § 922(d). Under 18 U. S. C. § 925(c), however, felons who have committed crimes not involving firearms may apply to the Bureau for administrative relief from these disabilities. No such relief is permitted for former mental patients.

Section 925(c) provides in relevant part:

> "A person who has been convicted for a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter or of the National Firearms Act) may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, or possession of firearms and incurred by reason of such conviction, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."

The District Court held that this scheme violated equal protection principles because, in its view, "[t]here is no rational basis for thus singling out mental patients for permanent disabled status, particularly as compared to convicts." 602 F. Supp., at 689. The court also concluded that the statutory scheme was unconstitutional because it "in effect creates an irrebuttable presumption that one who has been committed, no matter the circumstances, is forever mentally ill and dangerous." *Id.*, at 690. We noted probable jurisdiction over the Government's appeal, 474 U. S. 943 (1985), and the case was argued on March 26, 1986.

Meanwhile, Congress came to the conclusion, as a matter of legislative policy, that the firearms statutes should be redrafted. On May 19, 1986, while this case was under consideration here, the President signed into law Pub. L. 99–308, 100 Stat. 449. Section 105 of the statute amends the provision providing for administrative relief from firearms disabilities, 18 U. S. C. § 925(c), by striking out the language limiting the provision to certain felons and changing the statute to read that any person who "is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition" may apply to the Secretary of the Treasury for relief. Section 110 of the statute provides that the amendment made by § 105 "shall be applicable to any action, petition, or appellate proceeding pending on the date of the enactment of this Act."

This enactment significantly alters the posture of this case. The new statutory scheme permits the Secretary to grant relief in some circumstances to former involuntarily committed mental patients such as appellee. The new approach affords an administrative remedy to former mental patients like that Congress provided for others prima facie ineligible to purchase firearms. Thus, it can no longer be contended that such persons have been "singled out." Also, no "irrebuttable presumption" now exists since a hearing is afforded to anyone subject to firearms disabilities. Accordingly, the equal protection and "irrebuttable presumption" issues discussed by the District Court are now moot. See *United Building and Construction Trades Council of Camden County and Vicinity* v. *Mayor and Council of Camden*, 465 U. S. 208, 213 (1984).

In such circumstances, "it is the duty of the appellate court to set aside the decree below . . . ." *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, 267 (1936); see also *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39–40 (1950). We therefore vacate the judgment of the District Court. However, since appellee's complaint appears to raise other issues best addressed in the first instance by the District Court, we also remand the case for further proceedings consistent with this opinion.

Vacated and remanded.

TY OF RIVERSIDE ET AL. *v.* RIVERA ET AL.

RARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

85-224. Argued March 31, 1986—Decided June 27, 1986

nts, eight Chicano individuals, attended a party at the home of
he respondents. A large number of officers of petitioner city's
rce, acting without a warrant, broke up the party by using tear
unnecessary physical force, and many of the guests, including
the respondents, were arrested. Criminal charges were ulti-
dismissed. Respondents filed suit in Federal District Court
the city, its Chief of Police, and 30 individual police officers under
federal Civil Rights Acts, alleging violations of respondents'
ourth, and Fourteenth Amendment rights as well as numerous
v claims. Ultimately the jury returned 37 individual verdicts in
respondents and against the city and five individual officers,
11 violations of 42 U. S. C. § 1983, 4 instances of false arrest
risonment, and 22 instances of negligence. Respondents were
l $33,350 in compensatory and punitive damages. They also
ttorney's fees under the Civil Rights Attorney's Fees Awards
976, 42 U. S. C. § 1988, in the amount of $245,456.25, based on
hours expended by their two attorneys at $125 per hour and
rs expended by law clerks at $25 per hour. Finding both the
d rates reasonable, the District Court awarded respondents the
ed amount, and the Court of Appeals affirmed. This Court re-
for reconsideration in light of the intervening decision in
v. *Eckerhart*, 461 U. S. 424, and the District Court, after addi-
earings and review of the matter, made extensive findings of fact
lusions of law, and again concluded that respondents were enti-
n award of the requested amount of attorney's fees. The Court
als again affirmed, ruling, *inter alia*, that the fee award was not
e merely because it exceeded the amount of damages awarded
ury.

judgment is affirmed.

1580, affirmed.

CE BRENNAN, joined by JUSTICE MARSHALL, JUSTICE BLACK-
d JUSTICE STEVENS, concluded tha :

der *Hensley* v. *Eckerhart*, *supra*, which announced certain
es for calculating a "reasonable" attorney's fee under § 1988, the
r" figure, obtained by multiplying the number of hours reason-

ably expended on the litigation by a reasonable hourly rate, is presumed to be the reasonable fee contemplated by § 1988, and an important factor, among others, for consideration in adjusting the lodestar figure upward or downward is the "results obtained." Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee, and the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. The record here establishes that the District Court correctly applied the factors announced in *Hensley* and did not abuse its discretion in awarding attorney's fees for all time reasonably spent litigating the case. Pp. 567–573.

2. There is no merit to the argument that *Hensley*'s lodestar approach is inappropriate in civil rights cases where a plaintiff recovers only monetary damages, and that, in such cases, fees in excess of the amount of damages recovered are necessarily unreasonable. Although the amount of damages recovered is relevant to the amount of attorney's fees to be awarded under § 1988, it is only one of many factors that a court should consider in calculating an award of attorney's fees. Pp. 573–580.

(a) A civil rights action for damages does not constitute merely a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief, but instead recognized that reasonable attorney's fees under § 1988 are not conditioned upon and need not be proportionate to an award of money damages. Pp. 574–576.

(b) A rule limiting attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting § 1988. Congress enacted § 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process. A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts, and would be totally inconsistent with Congress' purpose of ensuring sufficiently vigorous enforcement of civil rights. In order to ensure that lawyers would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonably expended on a case. Pp. 576–580.

3. Although Congress did not intend that statutory fee awards produce "windfalls" to attorneys, neither did it intend that attorney's fees be proportionate to the amount of damages a civil rights plaintiff

might recover. Rather, there already exists a wide range of safeguards that are designed to protect civil rights defendants against the possibility of excessive fee awards, and that adequately protect against the possibility that § 1988 might produce a "windfall" to civil rights attorneys. Pp. 580–581.

JUSTICE POWELL concluded that the District Court's detailed findings concerning the fee award, which were accepted by the Court of Appeals, were not "clearly erroneous" for purposes of Federal Rule of Civil Procedure 52(a), and that the District Court did not abuse its discretion in making the fee award. JUSTICE POWELL also concluded that neither the decisions of this Court nor the legislative history of § 1988 support a rule of proportionality between fees awarded and damages recovered in a civil rights case, and rejected the argument that the prevailing contingent fee rate charged by counsel in personal injury cases should be considered the reasonable fee for purposes of § 1988. Pp. 581–586.

BRENNAN, J., announced the judgment of the Court and delivered an opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in the judgment, *post*, p. 581. BURGER, C. J., filed a dissenting opinion, *post*, p. 587. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE and O'CONNOR, JJ., joined, *post*, p. 588.

Jonathan Kotler argued the cause and filed briefs for petitioners.

Gerald P. Lopez argued the cause and filed a brief for respondents.*

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Geller, William Kanter,* and *Michael Jay Singer;* for Americans for Effective Law Enforcement, Inc., et al. by *Jack E. Yelverton, David Crump, Daniel B. Hales, Fred E. Inbau, Wayne W. Schmidt,* and *James P. Manak;* for Concerned Women for American Education and Legal Defense Foundation by *Michael P. Farris* and *Jordan W. Lorence;* for the Equal Employment Advisory Council by *Robert E. Williams, Douglas S. McDowell,* and *Thomas R. Bagby;* and for Congressman Thomas J. Bliley, Jr., et al. by *Daniel J. Popeo* and *George C. Smith.*

Briefs of *amici curiae* urging affirmance were filed for Lambda Legal Defense and Education Fund, Inc., et al. by *Abby R. Rubenfeld;* and for the NAACP Legal Defense and Educational Fund, Inc., by *Julius LeVonne Chambers* and *Charles Stephen Ralston.*

Paul M. Smith and *Joseph N. Onek* filed a brief for the Washington Council of Lawyers et al. as *amici curiae.*

JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join.

The issue presented in this case is whether an award of attorney's fees under 42 U. S. C. § 1988 is *per se* "unreasonable" within the meaning of the statute if it exceeds the amount of damages recovered by the plaintiff in the underlying civil rights action.

I

Respondents, eight Chicano individuals, attended a party on the evening of August 1, 1975, at the Riverside, California, home of respondents Santos and Jennie Rivera. A large number of unidentified police officers, acting without a warrant, broke up the party using tear gas and, as found by the District Court, "unnecessary physical force." Many of the guests, including four of the respondents, were arrested. The District Court later found that "[t]he party was not creating a disturbance in the community at the time of the break-in." App. 188. Criminal charges against the arrestees were ultimately dismissed for lack of probable cause.

On June 4, 1976, respondents sued the city of Riverside, its Chief of Police, and 30 individual police officers under 42 U. S. C. §§ 1981, 1983, 1985(3), and 1986 for allegedly violating their First, Fourth, and Fourteenth Amendment rights. The complaint, which also alleged numerous state-law claims, sought damages and declaratory and injunctive relief. On August 5, 1977, 23 of the individual police officers moved for summary judgment; the District Court granted summary judgment in favor of 17 of these officers. The case against the remaining defendants proceeded to trial in September 1980. The jury returned a total of 37 individual verdicts in favor of the respondents and against the city and five individual officers, finding 11 violations of § 1983, 4 instances of false arrest and imprisonment, and 22 instances of negligence. Respondents were awarded $33,350 in compensatory and punitive damages: $13,300 for their federal claims, and $20,050 for their state-law claims.[1]

Respondents also sought attorney's fees and costs under § 1988. They requested compensation for 1,946.75 hours expended by their two attorneys at a rate of $125 per hour, and for 84.5 hours expended by law clerks at a rate of $25 per hour, a total of $245,456.25. The District Court found both the hours and rates reasonable, and awarded respondents $245,456.25 in attorney's fees. The court rejected respondents' request for certain additional expenses, and for a multiplier sought by respondents to reflect the contingent nature of their success and the high quality of their attorneys' efforts.

Petitioners appealed only the attorney's fees award, which the Court of Appeals for the Ninth Circuit affirmed. *Rivera* v. *City of Riverside*, 679 F. 2d 795 (1982). Petitioners sought a writ of certiorari from this Court. We granted the writ, vacated the Court of Appeals' judgment, and remanded the case for reconsideration in light of *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983). 461 U. S. 952 (1983). On remand, the District Court held two additional hearings, reviewed additional briefing, and reexamined the record as a whole. The court made extensive findings of fact and conclusions of law, and again concluded that respondents were entitled to an award of $245,456.25 in attorney's fees, based on the same total number of hours expended on the case and the same hourly rates.[2] The court again denied respondents' request for certain expenses and for a multiplier.

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[1] Counsel for respondents explained to the District Court that respondents had not pursued their request for injunctive relief because "the bottom line of what we would ask for is that the police officers obey the law. And that is virtually always denied by a court because a court properly, I think, says that for the future we will assume that all police officers will abide by the law, including the Constitution." App. 219. The District Court's response to this explanation is significant:

"[I]f you [respondents] had asked for [injunctive relief] against some of the officers I think I would have granted it. . . . I would agree with you that there is a problem about telling the officers that they have to obey the law. But if you want to know what the Court thought about some of the behavior, it was—it would have warranted an injunction." *Ibid.*

Petitioners again appealed the fee award. And again, the Court of Appeals affirmed, finding that "the district court correctly reconsidered the case in light of *Hensley* . . . ." 763 F. 2d 1580, 1582 (1985). The Court of Appeals rejected three arguments raised by petitioners. First, the court rejected petitioners' contention that respondents' counsel should not have been compensated for time spent litigating claims other than those upon which respondents ultimately prevailed. Emphasizing that the District Court had determined that respondents' attorneys had "spent no time on claims unrelated to the successful claims," *ibid.*, the Court of Appeals concluded that "[t]he record supports the district court's findings that all of the plaintiffs' claims involve a 'common core of facts' and that the claims involve related legal theories." *Ibid.* The court also observed that, consistent with *Hensley*, the District Court had "considered the degree of success [achieved by respondents' attorneys] and found a reasonable relationship between the extent of that success and the amount of the fee award." 763 F. 2d, at 1582. Second, the Court of Appeals rejected the argument that the fee award was excessive because it exceeded the amount of damages awarded by the jury. Examining the legislative history of § 1988, the court found no support for the proposition that an award of attorney's fees may not exceed the amount of damages recovered by a prevailing plaintiff. Finally, the court found that the District Court's "extensive findings of fact and conclusions of law" belied petitioners' claim that the District Court had not reviewed the record to determine whether the fee award was justified. The Court of Appeals concluded:

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[2] The District Court determined that $125 per hour was the "rate typical of the prevailing market rate for similar services by lawyers of comparable skill, experience and reputation within the Central District at the time these services were performed," *id.*, at 190, and that "[t]he rate of $25 per hour, which counsel seeks as compensation for the time expended by two law clerks, was lower than the customary hourly rate for such services at the time those services were performed." *Ibid.*

> "In short, the district court applied the necessary criteria to justify the attorney's fees awarded and explained the reasons for the award clearly and concisely. As required by *Hensley*, the district court adequately discussed the extent of the plaintiffs' success and its relationship to the amount of the attorney's fees awarded. The award is well within the discretion of the district court." *Id.*, at 1583 (citation omitted).

Petitioners again sought a writ of certiorari from this Court, alleging that the District Court's fee award was not "reasonable" within the meaning of § 1988, because it was disproportionate to the amount of damages recovered by respondents. We granted the writ, 474 U. S. 917 (1985), and now affirm the Court of Appeals.

II

A

In *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975), the Court reaffirmed the "American Rule" that, at least absent express statutory authorization to the contrary, each party to a lawsuit ordinarily shall bear its own attorney's fees. In response to *Alyeska*, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, which authorized the district courts to award reasonable attorney's fees to prevailing parties in specified civil rights litigation. While the statute itself does not explain what constitutes a reasonable fee, both the House and Senate Reports accompanying § 1988 expressly endorse the analysis set forth in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (CA5 1974). See S. Rep. No. 94-1011, p. 6 (1976) (hereafter Senate Report); H. R.

Rep. No. 94-1558, p. 8 (1976) (hereafter House Report). *Johnson* identifies 12 factors to be considered in calculating a reasonable attorney's fee.[3]

Hensley v. *Eckerhart*, *supra*, announced certain guidelines for calculating a reasonable attorney's fee under § 1988. *Hensley* stated that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.*, at 433. This figure, commonly referred to as the "lodestar," is presumed to be the reasonable fee contemplated by § 1988. The opinion cautioned that "[t]he district court . . . should exclude from this initial fee calculation hours that were not 'reasonably expended'" on the litigation. *Id.*, at 434 (quoting Senate Report, at 6).

Hensley then discussed other considerations that might lead the district court to adjust the lodestar figure upward or downward, including the "important factor of the 'results obtained.'" 461 U. S., at 434. The opinion noted that where a prevailing plaintiff has succeeded on only some of his claims, an award of fees for time expended on unsuccessful claims may not be appropriate. In these situations, the Court held that the judge should consider whether or not the plaintiff's unsuccessful claims were related to the claims on which he succeeded, and whether the plaintiff achieved a level of success that makes it appropriate to award attorney's fees for hours reasonably expended on unsuccessful claims:

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[3] These factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F. 2d, at 717-719.

> "In [some] cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.*, at 435.

Accordingly, *Hensley* emphasized that "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee," and that "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Ibid.*

B

Petitioners argue that the District Court failed properly to follow *Hensley* in calculating respondents' fee award. We disagree. The District Court carefully considered the results obtained by respondents pursuant to the instructions set forth in *Hensley*, and concluded that respondents were entitled to recover attorney's fees for all hours expended on the litigation. First, the court found that "[t]he amount of time expended by counsel in conducting this litigation was reasonable and reflected sound legal judgment under the circumstances." App. 190.[4] The court also determined that counsel's excellent performances in this case entitled them to be compensated at prevailing market rates, even though they were relatively young when this litigation began. See *Johnson*, 488 F. 2d, at 718–719 ("If a young attorney demonstrates the skill and ability, he should not be penalized for only recently being admitted to the bar").

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[4] *Hensley* stated that a fee applicant should "exercise 'billing judgment' with respect to hours worked." 461 U. S., at 437. Petitioners maintain that respondents failed to exercise "billing judgment" in this case, since they sought compensation for all time spent litigating this case. We think this argument misreads the mandate of *Hensley*. *Hensley* requires a fee applicant to exercise "billing judgment" not because he should necessarily be compensated for less than the actual number of hours spent litigating a case, but because the hours he does seek compensation for must be *reasonable*. "Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or other-

The District Court then concluded that it was inappropriate to adjust respondents' fee award downward to account for the fact that respondents had prevailed only on some of their claims, and against only some of the defendants. The court first determined that "it was never actually clear what officer did what until we had gotten through with the whole trial," App. 236, so that "[u]nder the circumstances of this case, it was reasonable for plaintiffs initially to name thirty-one individual defendants . . . as well as the City of Riverside as defendants in this action." *Id.*, at 188. The court remarked:

> "I think every one of the claims that were made were related and if you look at the common core of facts that we had here that you had total success. . . . There was a problem about who was responsible for what and that problem was there all the way through to the time that we concluded the case. Some of the officers couldn't agree about who did what and it is not at all suprising that it would, in my opinion, have been wrong for you

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wise unnecessary . . . ." *Id.*, at 434. In this case, the District Court found that the number of hours expended by respondents' counsel was *reasonable*. Thus, counsel did, in fact, exercise the "billing judgment" recommended in *Hensley*.

Hensley also stated that a fee applicant should "maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." *Id.*, at 437. Petitioners submit that the time records submitted by respondents' attorneys made it difficult for the District Court to identify and separate distinct claims. The District Court, however, does not appear to have shared this view. In any event, while it is true that some of the disputed time records do not identify the precise claims worked on at the time, we find this lapse unimportant, in light of the District Court's finding that all of respondents' claims were interrelated.

> not to join all those officers since you yourself did not know precisely who were the officers that were responsible." *Id.*, at 235–236.

The court then found that the lawsuit could not "be viewed as a series of discrete claims," *Hensley*, 461 U. S., at 435:

> "All claims made by plaintiffs were based on a common core of facts. The claims on which plaintiffs did not prevail were closely related to the claims on which they did prevail. The time devoted to claims on which plaintiffs did not prevail cannot reasonably be separated from time devoted to claims on which plaintiffs did prevail." App. 189.

The District Court also considered the amount of damages recovered, and determined that the size of the damages award did not imply that respondents' success was limited:

> "[T]he size of the jury award resulted from (a) the general reluctance of jurors to make large awards against police officers, and (b) the dignified restraint which the plaintiffs exercised in describing their injuries to the jury. For example, although some of the actions of the police would clearly have been insulting and humiliating to even the most insensitive person and were, in the opinion of the Court, intentionally so, plaintiffs did not attempt to play up this aspect of the case." *Id.*, at 188–189.[5]

The court paid particular attention to the fact that the case "presented complex and interrelated issues of fact and law,"

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[5] At the second hearing on remand, the court also remarked:

"I have tried several civil rights violation cases in which police officers have figured and in the main they prevailed because juries do not bring in verdicts against police officers very readily nor against cities. The size of the verdicts against the individuals is not at all surprising because juries are very reluctant to bring in large verdicts against police officers who don't have the resources to answer those verdicts. The relief here I think was absolutely complete." App. 235.

id., at 187, and that "[a] fee award in this civil rights action will . . . advance the public interest," *id.*, at 191:

> "Counsel for plaintiffs . . . served the public interest by vindicating important constitutional rights. Defendants had engaged in lawless, unconstitutional conduct, and the litigation of plaintiffs' case was necessary to remedy defendants' misconduct. Indeed, the Court was shocked at some of the acts of the police officers in this case and was convinced from the testimony that these acts were motivated by a general hostility to the Chicano community in the area where the incident occured. The amount of time expended by plaintiffs' counsel in conducting this litigation was clearly reasonable and necessary to serve the public interest as well as the interests of plaintiffs in the vindication of their constitutional rights." *Id.*, at 190.

Finally, the District Court "focus[ed] on the significance of the overall relief obtained by [respondents] in relation to the hours reasonably expended on the litigation." *Hensley*, *supra*, at 435. The court concluded that respondents had "achieved a level of success in this case that makes the total number of hours expended by counsel a proper basis for making the fee award," App. 192:

> "Counsel for plaintiffs achieved excellent results for their clients, and their accomplishment in this case was outstanding. The amount of time expended by counsel in conducting this litigation was reasonable and reflected sound legal judgment under the circumstances." *Id.*, at 190.

Based on our review of the record, we agree with the Court of Appeals that the District Court's findings were not clearly erroneous. We conclude that the District Court correctly applied the factors announced in *Hensley* in calculating respondents' fee award, and that the court did not abuse its discretion in awarding attorney's fees for all time reasonably spent litigating the case.[6]

III

Petitioners, joined by the United States as *amicus curiae*, maintain that *Hensley*'s lodestar approach is inappropriate in civil rights cases where a plaintiff recovers only monetary damages. In these cases, so the argument goes, use of the lodestar may result in fees that exceed the amount of damages recovered and that are therefore unreasonable. Likening such cases to private tort actions, petitioners and the United States submit that attorney's fees in such cases should be proportionate to the amount of damages a plaintiff recovers. Specifically, they suggest that fee awards in damages cases should be modeled upon the contingent-fee arrangements commonly used in personal injury litigation. In this case, assuming a 33% contingency rate, this would entitle respondents to recover approximately $11,000 in attorney's fees.

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[6] In addition to the amount involved and the results obtained, the District Court also discussed several of the other factors identified in *Johnson*, including: the time and labor required; the novelty and difficulty of the questions presented; the skill requisite to perform the legal service properly; the customary fee; the experience, reputation, and ability of the attorneys; and the undesirability of the case.

With respect to the time and labor required to litigate the case, petitioners suggest that much of the time for which respondents' counsel received compensation was not "reasonable." See Brief for Petitioners 12–13. However, the District Court considered, and properly rejected, these arguments. For example, petitioners object to fees being awarded for the 59 hours respondents' counsel spent preparing jury instructions which, according to petitioners, "were subsequently mostly discarded by the trial court." *Id.*, at 12. The District Court, however, denied having discarded respondents' jury instructions. App. 215. Similarly, petitioners object to fees being awarded for 197 hours of conversation between respondents' two attorneys. The District Court however, noted: "I haven't got any doubt that it probably took 250 hours of conversation about the case between the two of them." *Ibid.* We believe that the District Court was in the best position to determine whether the time expended by respondents' counsel was reasonable.

The amount of damages a plaintiff recovers is certainly relevant to the amount of attorney's fees to be awarded under § 1988. See *Johnson*, 488 F. 2d, at 718. It is, however, only one of many factors that a court should consider in calculating an award of attorney's fees. We reject the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers.

A

As an initial matter, we reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. See *Carey* v. *Piphus*, 435 U. S. 247, 266 (1978). And, Congress has determined that "the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff. . . ." *Hensley*, 461 U. S., at 444, n. 4 (BRENNAN, J., concurring in part and dissenting in part). Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards. In this case, for example, the District Court found that many of petitioners' unlawful acts were "motivated by a general hostility to the Chicano community," App. 190, and that this litigation therefore served the public interest:

> "The institutional behavior involved here . . . had to be stopped and . . . nothing short of having a lawsuit like this would have stopped it. . . . [T]he improper motivation which appeared as a result of all of this seemed to

> me to have pervaded a very broad segment of police officers in the department." *Id.*, at 237.[7]

In addition, the damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future. See *McCann* v. *Coughlin*, 698 F. 2d 112, 129 (CA2 1983). This deterrent effect is particularly evident in the area of individual police misconduct, where injunctive relief generally is unavailable.

Congress expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit "'does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest importance.'" House Report, at 2 (quoting *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968)). "If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers." 122 Cong. Rec. 33313 (1976) (remarks of Sen. Tunney).

Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief. Rather, Congress made clear that it "intended that the amount of fees awarded under [§ 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and *not be reduced because the rights involved may be nonpecuniary in nature*." Senate Report, at 6 (emphasis added). "[C]ounsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, '*for all time reasonably expended on a matter.*'" *Ibid.* (quoting *Van Davis*

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[7] The District Court also observed that even though respondents ultimately dropped their request for injunctive relief, petitioners' misconduct clearly "would have warranted an injunction." *Id.*, at 219; see n. 1, *supra*.

v. *County of Los Angeles*, 8 EPD ¶9444 (CD Cal. 1974) (emphasis added)). The Senate Report specifically approves of the fee awards made in cases such as *Stanford Daily* v. *Zurcher*, 64 F. R. D. 680 (ND Cal. 1974); *Van Davis* v. *County of Los Angeles, supra;* and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F. R. D. 483 (WDNC 1975). In each of these cases, counsel received substantial attorney's fees despite the fact the plaintiffs sought no monetary damages. Thus, Congress recognized that reasonable attorney's fees under § 1988 are not conditioned upon and need not be proportionate to an award of money damages. The lower courts have generally eschewed such a requirement.[8]

B

A rule that limits attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting § 1988. Congress enacted § 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process. See House Report, at 3. These victims ordinarily cannot afford to purchase legal services at the rates set by the private market. See *id.*, at 1 ("Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts"); Senate Report, at 2 ("In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer"); see also 122 Cong. Rec. 35127 (1976) (remarks of Rep. Holtzman) ("Plaintiffs who suffer discrimination and other infringements of their civil rights are usually not wealthy people"); *id.*, at 35128 (remarks of Rep. Seiberling) ("Most Americans . . . cannot afford to hire a lawyer if their constitutional rights are violated or if they are the victims of illegal discrimination"); *id.*, at 31832 (remarks of Sen. Hathaway) ("[R]ight now the vindication of important congressional policies in the vital area of civil rights is made to depend upon the financial resources of those least able to promote them"). Moreover, the contingent fee arrangements that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases, which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries. As the House Report states:

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[8] See *DeFilippo* v. *Morizio*, 759 F. 2d 231, 235 (CA2 1985); *Ramos* v. *Lamm*, 713 F. 2d 546, 557 (CA10 1983); *McCann* v. *Coughlin*, 698 F. 2d 112, 128–129 (CA2 1983); *Jones* v. *MacMillan Bloedel Containers, Inc.*, 685 F. 2d 236, 238–239 (CA8 1982); *Basiardanes* v. *City of Galveston*, 682 F. 2d 1203, 1220 (CA5 1982); *Furtado* v. *Bishop*, 635 F. 2d 915, 917–918 (CA1 1980); *Coop* v. *City of South Bend*, 635 F. 2d 652, 655 (CA7 1980); *Perez* v. *University of Puerto Rico*, 600 F. 2d 1, 2 (CA1 1979); *Walston* v. *School Board*, 566 F. 2d 1201, 1204–1205 (CA4 1977).

> "[W]hile damages are theoretically available under the statutes covered by [§ 1988], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude *or severely limit the damage remedy.* Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and consitutional rights are to be adequately protected." House Report, at 9. (emphasis added; footnote omitted).

See also 122 Cong. Rec., at 33314 (remarks of Sen. Kennedy) ("[C]ivil rights cases—unlike tort or antitrust cases—do not provide the prevailing plaintiff with a large recovery from which he can pay his lawyer"). Congress enacted § 1988 specifically to enable plaintiffs to enforce the civil rights laws even where the amount of damages at stake would not otherwise make it feasible for them to do so:

> "[F]ee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vin-

> dicate the important Congressional policies which these laws contain.
>
> ". . . If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." Senate Report, at 2.

See also *Kerr* v. *Quinn*, 692 F. 2d 875, 877 (CA2 1982) ("The function of an award of attorney's fees is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel").

A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with Congress' purpose in enacting § 1988. Congress recognized that private-sector fee arrangements were inadequate to ensure sufficiently vigorous enforcement of civil rights. In order to ensure that lawyers would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonably expended on a case.[9]

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[9] Of course, we do not mean to suggest that private-sector comparisons are irrelevant to fee calculations under § 1988. We have suggested that in determining an appropriate hourly rate for a lawyer's services, "the rates charged in private representations may afford relevant comparisons." *Blum* v. *Stenson*, 465 U. S. 886, 896, n. 11 (1984). We have also indicated that "[c]ounsel for a prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Hensley*, 461 U. S., at 434. However, while private-market considerations are not irrelevant, Congress clearly rejected the notion that attorney's fees under § 1988 should be based on private-sector fee arrangements.

This case illustrates why the enforcement of civil rights laws cannot be entrusted to private-sector fee arrangements. The District Court observed that "[g]iven the nature of this lawsuit and the type of defense presented, many attorneys in the community would have been reluctant to institute and to continue to prosecute this action." App. 189. The court concluded, moreover, that "[c]ounsel for plaintiffs achieved excellent results for their clients, and their accomplishment in this case was outstanding. The amount of time expended by counsel in conducting this litigation was reasonable and reflected sound legal judgment under the circumstances." *Id.*, at 190. Nevertheless, petitioners suggest that respondents' counsel should be compensated for only a small fraction of the actual time spent litigating the case. In light of the difficult nature of the issues presented by this lawsuit and the low pecuniary value of many of the rights respondents sought to vindicate, it is highly unlikely that the prospect of a fee equal to a fraction of the damages respondents might recover would have been sufficient to attract competent counsel.[10] Moreover, since counsel might not have found it economically feasible to expend the amount of time respondents' counsel found necessary to litigate the case properly, it is even less likely that counsel would have achieved the excellent results that respondents' counsel obtained here. Thus, had respondents had to rely on private-sector fee arrangements, they might well have been unable to obtain redress for their grievances. It is precisely for this reason that Congress enacted § 1988.

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[10] The United States suggests that "[t]he prospect of recovering $11,000 for representing [respondents] in a damages suit (assuming a contingency rate of 33%) is likely to attract a substantial number of attorneys." Brief for United States as *Amicus Curiae* 22–23. However, the District Court found that the 1,946.75 hours respondents' counsel spent litigating the case were reasonable and that "[t]here was not any possible way that you could have avoided putting in that amount of time . . . ." App. 238. We reject the United States' suggestion that the prospect of working nearly 2,000 hours at a rate of $5.65 an hour, to be paid more than 10 years after the work began, is "likely to attract a substantial number of attorneys." Brief for United States as *Amicus Curiae* 23.

IV

We agree with petitioners that Congress intended that statutory fee awards be "adequate to attract competent counsel, but . . . not produce windfalls to attorneys." Senate Report, at 6. However, we find no evidence that Congress intended that, in order to avoid "windfalls to attorneys," attorney's fees be proportionate to the amount of damages a civil rights plaintiff might recover. Rather, there already exists a wide range of safeguards designed to protect civil rights defendants against the possibility of excessive fee awards. Both the House and Senate Reports identify standards for courts to follow in awarding and calculating attorney's fees, see *ibid.;* House Report, at 8; these standards are designed to ensure that attorneys are compensated only for time *reasonably expended* on a case. The district court has the discretion to deny fees to prevailing plaintiffs under special circumstances, see *Hensley*, 461 U. S., at 429 (citing Senate Report, at 4), and to award attorney's fees against plaintiffs who litigate frivolous or vexatious claims. See *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 416–417 (1978); *Hughes* v. *Rowe*, 449 U. S. 5, 14–16 (1980) *(per curiam);* House Report, at 6–7. Furthermore, we have held that a civil rights defendant is not liable for attorney's fees incurred after a pretrial settlement offer, where the judgment recovered by the plaintiff is less than the offer. *Marek* v. *Chesny*, 473 U. S. 1 (1985).[11] We believe that these safeguards adequately protect against the possibility that § 1988 might produce a "windfall" to civil rights attorneys.

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[11] Thus, petitioners could have avoided liability for the bulk of the attorney's fees for which they now find themselves liable by making a reasonable settlement offer in a timely manner. While petitioners did offer respondents $25,000 in settlement at the time the jury was deliberating the case, this offer was made, as the District Court noted, "well after [respondents' counsel] had spent thousands of dollars on preparation for trial . . . ." App. 237–238. "The government cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in re-

In the absence of any indication that Congress intended to adopt a strict rule that attorney's fees under § 1988 be proportionate to damages recovered, we decline to adopt such a rule ourselves.[12] The judgment of the Court of Appeals is hereby

Affirmed.

JUSTICE POWELL, concurring in the judgment.

I join only the Court's judgment. The plurality opinion reads our decision in *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983), more expansively than I would, and more expansively than is necessary to decide this case. For me affirmance—quite simply—is required by the District Court's detailed findings of fact, which were approved by the Court of Appeals. On its face, the fee award seems unreasonable. But I find no basis for this Court to reject the findings made and approved by the courts below.

I

Because the history of the case is relevant to my views, I summarize it. City police officers, without warrants, forcibly entered a private residence where respondents were attending a party and arrested four of them. Criminal charges were lodged against those arrested, but later were dismissed. Respondents instituted this action on June 4, 1976, against petitioners city of Riverside, its Chief of Police, and

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sponse." *Copeland* v. *Marshall*, 205 U. S. App. D. C. 390, 414, 641 F. 2d 880, 904 (1980) (en banc).

[12] We note that Congress has been urged to amend § 1988 to prohibit the award of attorney's fees that are disproportionate to monetary damages recovered. See *e. g.*, The Legal Fees Equity Act, S. 2802, 98th Cong., 2d Sess. (1984); S. 1580, 99th Cong., 1st Sess. (1985). These efforts have thus far not been persuasive.

30 police officers. In addition to compensatory and punitive damages, the complaint sought preliminary and permanent injunctions against the city and its police force to prevent further alleged "discriminatory harassment" against Mexican Americans. At some point in the proceedings, respondents abandoned their claims for injunctive relief. On January 10, 1978, the District Court granted summary judgment in favor of 17 of the defendant police officers. Following extensive discovery, the case finally went to trial on September 16, 1980. After nine days of trial, and seven days of deliberations, the jury returned verdicts against the city and only five of the officers.

Specifically, the jury found that the city and three of the officers had violated 42 U. S. C. § 1983, and awarded $13,300 in compensatory and punitive damages for these civil rights violations. The jury also concluded that the city and five of the officers, including the three found to have violated § 1983, had committed numerous acts of common-law negligence, false arrest, and false imprisonment. For these state-law claims, the jury awarded damages of $20,050, bringing total damages to $33,350. Respondents sought attorney's fees under 42 U. S. C. § 1988. Their two lawyers, each having been admitted to practice for approximately five years, claimed compensation for 1,946.75 hours at a rate of $125 per hour each, and for 84.5 hours by law clerks at $25 per hour, for a total of $245,456.25. As emphasized by petitioners, this award was some seven times the amount of compensatory and punitive damages awarded.

The District Court approved in full the requested amount.[1] On appeal, petitioners challenged only the fee award, and the Court of Appeals for the Ninth Circuit affirmed. *Rivera* v. *City of Riverside*, 679 F. 2d 795 (1982). On May 31, 1983, we granted certiorari, vacated the Court of Appeals' judgment, and remanded the case for reconsideration in light of *Hensley*

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[1] The District Court did refuse a request to double the award.

v. *Eckerhart, supra.* 461 U. S. 952 (1983). On remand, the District Court heard oral argument and "reconsidered the memoranda, affidavits, and exhibits previously filed by the parties, as well the record as a whole." App. to Pet. for Cert. 2-2. That court then made explicit findings of fact, including the following that are relevant to the fee award:

> 1. "All claims made by plaintiffs were based on a common core of facts. The claims on which plaintiffs did not prevail were closely related to the claims on which they did prevail. The time devoted to claims on which plaintiffs did not prevail cannot reasonably be separated from time devoted to claims on which plaintiffs did prevail."
>
> 2. "Counsel demonstrated outstanding skill and experience in handling this case."
>
> 3. "[M]any attorneys in the community would have been reluctant to institute and to continue to prosecute this action."
>
> 4. The number of hours claimed to have been expended by the two lawyers was "fair and reasonable."
>
> 5. "Counsel for plaintiffs achieved excellent results for their clients, and their accomplishment in this case was outstanding. The amount of time expended by counsel . . . was reasonable and reflected sound legal judgment under the circumstances."
>
> 6. Counsel "also served the public interest by vindicating important constitutional rights."
>
> 7. The "hourly rate [of $125 per hour is] typical of the prevailing market rate for similar services by lawyers of comparable skill, experience and reputation within the Central District at the time these services were performed."
>
> 8. Finally, in view of the level of success attained in this case, "the total number of hours expended by counsel [is] a proper basis for making the fee award." *Id.*, at 2-6 to 2-10.

Federal Rule of Civil Procedure 52(a) provides that "[f]indings of fact [by a district court] shall not be set aside unless clearly erroneous . . . ." The Court of Appeals did not disagree with any of the foregoing findings by the District Court. I see no basis on which this Court now could hold that these findings are clearly erroneous. See *Anderson* v. *Bessemer City*, 470 U. S. 564 (1985). To be sure, some of the findings fairly can be viewed as conclusions or matters of opinion, but the findings that are critical to the judgments of the courts below are objective facts. JUSTICE REHNQUIST's arguments in dissent suggest that the District Court may have been mistaken. But, as we observed in *Bessemer City*, "a reviewing court [may not] reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Id.*, at 573.

II

I comment briefly on the principal arguments made by petitioners. They emphasize that although suit was instituted against the city, its Chief of Police, and 30 police officers, respondents prevailed only against the city and 5 of the officers. It is true that under *Hensley* fees should not be awarded for hours spent on claims as to which the plaintiffs were unsuccessful. *Hensley* also teaches, however, that where a "lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." 461 U. S., at 440. Here, the District Judge who presided throughout this protracted litigation found that the claims of respondents rested on a "common core of facts," and involved related legal theories. Since the suit was premised on one episode, the only significant variation in the facts supporting the claims against the several defendants concerned the extent of the participation by the various police officers.[2] Petitioners offer no persuasive reason to question the District Court's express finding that "[t]he time devoted to claims on which plaintiffs did not prevail cannot reasonably be separated from time devoted to claims on which plaintiffs did prevail." App. to Pet. for Cert. 2-6 to 2-7.

Petitioners argue for a rule of proportionality between the fee awarded and the damages recovered in a civil rights case. Neither the decisions of this Court nor the legislative history of § 1988 support such a "rule." The facts and circumstances of litigation are infinitely variable. Under *Hensley*, of course, "the most critical factor [in the final determination of fee awards] is the degree of success obtained." 461 U. S., at 436. Where recovery of private damages is the purpose of a civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought. In some civil rights cases, however, the court may consider the vindication of constitutional rights in addition to the amount of damages recovered. In this case, for example, the District Court made an explicit finding that the "public interest" had been served by the jury's verdict that the warrantless entry was lawless and unconstitutional. Although the finding of a Fourth Amendment violation hardly can be considered a new constitutional ruling, in the special circumstances of this case, the vindication of the asserted Fourth Amendment right may well have served a public interest, supporting the amount of the fees awarded.[3] As the District Court put it, there were allegations that the police misconduct was "motivated by a general hostility to the Chicano community in the area . . . ." App. to Pet. for Cert. 2–8. The record also contained evidence of racial slurs by some of the police.

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[2] A district court should be alert in a case such as this one to consider whether counsel, without adequate basis, may have included as defendants persons whose conduct was too peripheral to support liability or even irrelevant to the substantive allegations of the complaint. In this case, for example, of the 30 defendant officers originally named, 17 were dismissed prior to trial, and 8 more were cleared by the jury's verdict. Thus, only five—a small fraction of the number sued—were held liable. Such a wide difference between the number of defendants named and the number ultimately found to have any responsibility for the alleged injury could raise serious doubt as to whether counsel had reasonable grounds for suing certain defendants. Overstating the number of defendants readily could lead to inflation of billable hours and thus of the fee requested. Here, however, the District Court expressly found that "[u]nder the circumstances of this case, it was reasonable for plaintiffs initially to name thirty-one individual defendants (thirty police officers and the chief of police)." App. to Pet. for Cert. 2-4.

Finally, petitioners also contend that in determining a proper fee under § 1988 in a suit for damages the court should consider the prevailing contingent-fee rate charged by counsel in personal injury cases. The use of contingent-fee arrangements in many types of tort cases was customary long before Congress enacted § 1988. It is clear from the legislative history that § 1988 was enacted because existing fee arrangements were thought not to provide an adequate incentive to lawyers particularly to represent plaintiffs in unpopular civil rights cases. I therefore find petitioners' asserted analogy to personal injury claims unpersuasive in this context. Cf. *Memphis Community School Dist.* v. *Stachura*, *ante*, p. 299.

III

In sum, despite serious doubts as to the fairness of the fees awarded in this case, I cannot conclude that the detailed findings made by the District Court, and accepted by the Court of Appeals, were clearly erroneous, or that the District Court abused its discretion in making this fee award.[4]

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[3] It probably will be the rare case in which an award of *private damages* can be said to benefit the public interest to an extent that would justify the disproportionality between damages and fees reflected in this case.

[4] In Part III–B of its opinion, the plurality emphasizes that a primary purpose of § 1988 was to assure the availability of counsel in civil rights cases. This was an expressed and proper purpose of Congress when § 1988 was enacted a decade ago. Although the tables in the Annual Re-

CHIEF JUSTICE BURGER, dissenting.

I join JUSTICE REHNQUIST's dissenting opinion. I write only to add that it would be difficult to find a better example of legal nonsense than the fixing of attorney's fees by a judge at $245,456.25 for the recovery of $33,350 damages.

The two attorneys receiving this nearly quarter-million-dollar fee graduated from law school in 1973 and 1974; they brought this action in 1975, which resulted in the $33,350 jury award in 1980. Their total professional experience when this litigation began consisted of Gerald Lopez' 1-year service as a law clerk to a judge and Roy Cazares' two years' experience as a trial attorney in the Defenders' Program of San Diego County. For their services the District Court found that an hourly rate of $125 per hour was reasonable.

Can anyone doubt that no private party would ever have dreamed of paying these two novice attorneys $125 per hour in 1975, which, considering inflation, would represent perhaps something more nearly a $250 per hour rate today? For example, as JUSTICE REHNQUIST points out, *post*, at 590, would any private litigant be willing to pay a total of $17,875 simply for preparation of a pretrial order?

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port of the Director of the Administrative Office are not explicit in this respect, it is clear that the increased filings of civil rights cases that began following *Monroe* v. *Pape*, 365 U. S. 167 (1961), particularly § 1983 cases, have continued and even accelerated since 1976. See 1985 Annual Report of the Director of the Administrative Office 284–299 (identifying a category of "civil rights" cases, and also a category of state prisoner petitions, many of which are § 1983 cases). These facts suggest that § 1988 is serving well Congress' purpose to assure availability of counsel, and that this purpose does not justify more generous fee awards than otherwise would be viewed as fair and reasonable.

I know of no empirical study supporting the view that aggrieved persons now have difficulty in obtaining counsel in civil rights cases. Moreover, since 1976 the number of lawyers licensed in the United States has increased from approximately 396,000, 24 Employment and Earnings 8, Table 1, United States Dept. of Labor, Bureau of Labor Statistics (1977), to an estimated 675,000, B. Curran, The Lawyer Statistical Report 4 (1985).

This fee award plainly constitutes a grave abuse of discretion which should be rejected by this Court—particularly when we have already vacated and remanded this *identical* fee award previously—rather than simply affirming the District Court's findings as not being either "clearly erroneous" or an "abuse of discretion." See *ante*, at 572–573. The Court's result will unfortunately only add fuel to the fires of public indignation over the costs of litigation.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR join, dissenting.

In *Hensley* v. *Eckerhart*, 461 U. S. 424, 433 (1983), our leading case dealing with attorney's fees awarded pursuant to 42 U. S. C. § 1988, we said that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." As if we had foreseen the case now before us, we went on to emphasize that "[t]he district court . . . should exclude from this initial fee calculation hours that were not 'reasonably expended'" on the litigation. *Id.*, at 434, quoting S. Rep. No. 94–1011, p. 6 (1976). Today, despite its adoption of a revisionist interpretation of *Hensley*, the plurality nonetheless acknowledges that "*Hensley* requires a fee applicant to exercise 'billing judgment' not because he should necessarily be compensated for less than the actual number of hours spent litigating a case, but because the hours he does seek compensation for must be *reasonable*." *Ante*, at 569, n. 4 (emphasis in original). I see no escape from the conclusion that the District Court's finding that respondents' attorneys "reasonably" spent 1,946.75 hours to recover a money judgment of $33,350 is clearly erroneous, and that therefore the District Court's award of $245,456.25 in attorney's fees to respondents should be reversed. The Court's affirmance of the fee award emasculates the principles laid down in *Hensley*, and turns § 1988 into a relief Act for lawyers.

A brief look at the history of this case reveals just how "unreasonable" it was for respondents' lawyers to spend so much time on it. Respondents filed their initial complaint in 1976, seeking injunctive and declaratory relief and compensatory and punitive damages from the city of Riverside, its Chief of Police, and 30 police officers, based on 256 separate claims allegedly arising out of the police breakup of a single party. Prior to trial, 17 of the police officers were dismissed from the case on motions for summary judgment, and respondents dropped their requests for injunctive and declaratory relief. More significantly, respondents also dropped their original allegation that the police had acted with discriminatory intent. The action proceeded to trial, and the jury completely exonerated nine additional police officers. Respondents ultimately prevailed against only the city and five police officers on various § 1983, false arrest and imprisonment, and common negligence claims. No restraining orders or injunctions were ever issued against petitioners, nor was the city ever compelled to change a single practice or policy as a result of respondents' suit. The jury awarded respondents a total of $33,350 in compensatory and punitive damages. Only about one-third of this total, or $13,300, was awarded to respondents based on violations of their federal constitutional rights.

Respondents then filed a request for $495,713.51 in attorney's fees, representing approximately 15 times the amount of the underlying money judgment. In April 1981, the District Court made its initial fee award of $245,456.25, declining to apply respondents' requested "multiplier," but awarding, to the penny, the entire "lodestar" claimed by respondents and their attorneys. The Ninth Circuit affirmed, *Rivera* v. *City of Riverside*, 679 F. 2d 795 (1982). We granted certiorari, vacated, and remanded, 461 U. S. 952 (1983), in light of *Hensley, supra*. On remand, the District Court convened a hearing, at which the court promptly announced: "I tell you now that I will not change the award. I will simply go back and be more specific about it." App. 230. The court ultimately proved true to its word. After reviewing the record and the submissions of the parties, the court convened a second hearing, at which it approved exactly the same award as before: $245,456.25 in attorney's fees. The only noticeable change was that, the second time around, the court created a better "paper trail" by including in its order a discussion of those factors in *Hensley* and *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (CA5 1974), which it believed supported such a huge fee award. See App. 187–192. The Ninth Circuit again affirmed, 763 F. 2d 1580 (1985).

It is obvious to me that the District Court viewed *Hensley* not as a constraint on its discretion, but instead as a blueprint for justifying, in an after-the-fact fashion, a fee award it had already decided to enter solely on the basis of the "lodestar." In fact, the District Court failed at almost every turn to apply any kind of "billing judgment," or to seriously consider the "results obtained," which we described in *Hensley* as "the important factor" in determining a "reasonable" fee award. 461 U. S., at 434. A few examples should suffice: (1) The court approved almost 209 hours of "prelitigation time," for a total of $26,118.75. (2) The court approved some 197 hours of time spent in conversations between respondents' two attorneys, for a total of $24,625. (3) The court approved 143 hours for preparation of a pretrial order, for a total of $17,875. (4) Perhaps most egregiously, the court approved 45.50 hours of "stand-by time," or time spent by one of respondents' attorneys, who was then based in San Diego, to wait in a Los Angeles hotel room for a jury verdict to be rendered in Los Angeles, where his co-counsel was then employed by the U. C. L. A. School of Law, less than 40 minutes' driving time from the courthouse. The award for "stand-by time" totaled $5,687.50. I find it hard to understand how any attorney can be said to have exercised "billing judgment" in spending such huge amounts of time on a case ultimately worth only $33,350.

Indeed, on the basis of some of the statements made by the District Court in this case, I reluctantly conclude that the court may have attempted to make up to respondents in attorney's fees what it felt the jury had wrongfully withheld from them in damages. As the court noted in its opinion, apparently believing that the observation supported the entry of a huge award of attorney's fees:

> "[T]he size of the jury award resulted from (a) the general reluctance of jurors to make large awards against police officers, and (b) the dignified restraint which the plaintiffs exercised in describing their injuries to the jury. For example, although some of the actions of the police would clearly have been insulting and humiliating to even the most insensitive person and were, in the opinion of the Court, intentionally so, plaintiffs did not attempt to play up this aspect of the case." App. 188–189.

But a district court, in awarding attorney's fees under § 1988, does not sit to retry questions submitted to and decided by the jury. If jurors are reluctant to make large awards against police officers, this is a fact of life that plaintiffs, defendants, and district courts must live with, and a district court simply has no business trying to correct what it regards as an unfortunate tendency in the award of damages by granting inflated attorney's fees.

The analysis of whether the extraordinary number of hours put in by respondents' attorneys in this case was "reasonable" must be made in light of both the traditional billing practices in the profession, and the fundamental principle that the award of a "reasonable" attorney's fee under § 1988 means a fee that would have been deemed reasonable if billed to affluent plaintiffs by their own attorneys. This latter principle was stressed in the legislative history of § 1988, see

S. Rep. No. 94–1011, p. 6 (1976),* and by this Court in *Hensley:*

> "Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. 'In the private sector, "billing judgment" is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.'" 461 U. S., at 434, quoting *Copeland* v. *Marshall*, 205 U. S. App. D. C. 390, 401, 641 F. 2d 880, 891 (1980) (en banc) (emphasis in original).

I think that this analysis, which appears nowhere in the plurality's opinion, leads inexorably to the conclusion that the District Court's fee award of $245,456.25, based on a prevailing hourly rate of $125 multiplied by the number of hours which respondents' attorneys claim to have spent on the case, is not a "reasonable" attorney's fee under § 1988.

Suppose that A offers to sell Blackacre to B for $10,000. It is commonly known and accepted that Blackacre has a fair market value of $10,000. B consults an attorney and requests a determination whether A can convey good title to Blackacre. The attorney writes an elaborate memorandum concluding that A's title to Blackacre is defective, and submits a bill to B for $25,000. B refuses to pay the bill, the attorney sues, and the parties stipulate that the attorney spent 200 hours researching the title issue because of an extraordinarily complex legal and factual situation, and that

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*"In computing the fee, counsel for prevailing parties should be paid, *as is traditional with attorneys compensated by a fee-paying client*, 'for all time *reasonably* expended on a matter.'" S. Rep. No. 94–1011, p. 6 (1976) (emphasis added), quoting *Van Davis* v. *County of Los Angeles*, 8 FPD ¶ 9444 (CD Cal. 1974); *Stanford Daily* v. *Zurcher*, 64 F. R. D. 680, 684 (ND Cal. 1974).

the prevailing rate at which the attorney billed, which was also a "reasonable" rate, was $125. Does anyone seriously think that a court should award the attorney the full $25,000 which he claims? Surely a court would start from the proposition that, unless special arrangements were made between the client and the attorney, a "reasonable" attorney's fee for researching the title to a piece of property worth $10,000 could not exceed the value of the property. Otherwise the client would have been far better off never going to an attorney in the first place, and simply giving A $10,000 for a worthless deed. The client thereby would have saved himself $15,000.

Obviously the billing situation in a typical litigated case is more complex than in this bedrock example of a defective title claim, but some of the same principles are surely applicable. If A has a claim for contract damages in the amount of $10,000 against B, and retains an attorney to prosecute the claim, it would be both extraordinary and unjustifiable, in the absence of any special arrangement, for the attorney to put in 200 hours on the case and send the client a bill for $25,000. Such a bill would be "unreasonable," regardless of whether A obtained a judgment against B for $10,000 or obtained a take-nothing judgment. And in such a case, where the prospective recovery is limited, it is exactly this "billing judgment" which enables the parties to achieve a settlement; any competent attorney, whether prosecuting or defending a contract action for $10,000, would realize that the case simply cannot justify a fee in excess of the potential recovery on the part of either the plaintiff's or the defendant's attorney. All of these examples illuminate the point made in *Hensley* that "the important factor" in determining a "reasonable" fee is the "results obtained." 461 U. S., at 434. The very "reasonableness" of the hours expended on a case by a plaintiff's attorney necessarily will depend, to a large extent, on the amount that may reasonably be expected to be recovered if the plaintiff prevails.

The amount of damages which a jury is likely to award in a tort case is of course more difficult to predict than the amount it is likely to award in a contract case. But even in a tort case some measure of the kind of "billing judgment" previously described must be brought to bear in computing a "reasonable" attorney's fee. Again, a hypothetical example will illustrate the point. If, at the time respondents filed their lawsuit in 1976, there had been in the Central District of California a widely publicized survey of jury verdicts in this type of civil rights action which showed that successful plaintiffs recovered between $10,000 and $75,000 in damages, could it possibly be said that it would have been "reasonable" for respondents' attorneys to put in on the case hours which, when multiplied by the attorneys' prevailing hourly rate, would result in an attorney's fee of over $245,000? In the absence of such a survey, it might be more difficult for a plaintiff's attorney to accurately estimate the amount of damages likely to be recovered, but this does not absolve the attorney of the responsibility for making such an estimate and using it as a guide in the exercise of "billing judgment."

In the context of § 1988, there would obviously be some exceptions to the general rules of "billing judgment" which I have been discussing, but none of these exceptions are applicable here. If the litigation is unnecessarily prolonged by the bad-faith conduct of the defendants, or if the litigation produces significant, identifiable benefits for persons other than the plaintiffs, then the purpose of Congress in authorizing attorney's fees under § 1988 should allow a larger award of attorney's fees than would be "reasonable" where the only relief is the recovery of monetary damages by individual plaintiffs. Nor do we deal here with a case such as *Carey* v. *Piphus*, 435 U. S. 247, 266 (1978), in which the deprivation of a constitutional right necessarily results in only nominal pecuniary damages. See S. Rep. No. 94–1011, *supra*, at 6 (fee awards under § 1988 should "not be reduced because the rights involved may be nonpecuniary in nature"). Here, respondents successfully claimed both compensatory and punitive damages for false arrest and imprisonment, negligence, and violations of their constitutional rights under the Fourth and Fourteenth Amendments, and the jury assessed damages as juries do in such cases. In short, this case shares none of the special aspects of certain civil rights litigation which the plurality suggests, in Part III of its opinion, would justify an award of attorney's fees totally divorced from the amount of damages awarded by the jury.

The plurality, *ante*, Part III, at 573–574, explains the position advanced by petitioner and the United States concerning fee awards in a case such as this, and then goes on to "reject the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers." *Ante*, at 574. I agree with the plurality that the importation of the contingent-fee model to govern fee awards under § 1988 is not warranted by the terms and legislative history of the statute. But I do not agree with the plurality if it means to reject the kind of "proportionality" that I have previously described. Nearly 2,000 attorney-hours spent on a case in which the total recovery was only $33,000, in which only $13,300 of that amount was recovered for the federal claims, and in which the District Court expressed the view that, in such cases, juries typically were reluctant to award substantial damages against police officers, is simply not a "reasonable" expenditure of time. The snippets of legislative history which the plurality relies upon to dismiss *any* relationship between the amount of time put in on a case and the amount of damages awarded are wholly unconvincing. One may agree with all of the glowing rhetoric contained in the plurality's opinion about Congress' noble purpose in authorizing attorney's fees under § 1988 without concluding that Congress intended to turn attorneys loose to spend as many hours as possible to prepare and try a case that could reasonably be expected to result only in a relatively minor award of monetary damages.

In *Hensley*, we noted that "complex civil rights litigation involving numerous challenges to institutional practices or conditions" might well require "many hours of lawyers' services," and thus justify a large award of attorney's fees. 461 U. S., at 436. This case is a far cry from the situation we referred to in *Hensley*. I would reverse the judgment of the Ninth Circuit affirming the District Court's award of attorney's fees, and remand the case to the District Court for recomputation of the fee award in light of both *Hensley* and the principles set forth in this opinion.

UNITED STATES DEPARTMENT OF TRANSPORTATION ET AL. *v.* PARALYZED VETERANS OF AMERICA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-289. Argued March 26, 1986—Decided June 27, 1986

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against handicapped persons in "any program or activity receiving Federal financial assistance." The United States provides financial assistance to airport operators through grants from a Trust Fund under the Airport and Airway Development Act of 1970 and its successor statute, the Airport and Airway Improvement Act of 1982 (Trust Fund Acts). The Government also operates a nationwide air traffic control system. Respondent organizations representing handicapped individuals brought an action in the Court of Appeals challenging, *inter alia*, the conclusion of the Civil Aeronautics Board (CAB) that its regulatory authority under § 504 was limited to those few airlines that receive subsidies under the Federal Aviation Act. The Court of Appeals held that § 504 gave CAB jurisdiction over all air carriers by virtue of the extensive program of federal financial assistance to airports under the Trust Fund Acts, and that the air traffic control system was an additional source of financial assistance to airlines. The court then vacated the regulations to the extent that their application was limited to carriers receiving funds under the Federal Aviation Act, and instructed the Department of Transportation, CAB's successor, to issue new regulations that would apply to all commercial airlines.

Held: Section 504 is not applicable to commercial airlines. Pp. 603–612.

(a) Section 504's scope is limited to those who actually "receive" federal financial assistance. Congress sought to impose § 504 coverage as a condition or obligation tied to the recipient's agreement to accept the federal funds. By so limiting coverage to recipients, Congress imposed § 504's obligations upon those who are in a position to accept or reject those obligations as part of the decision whether or not to "receive" federal funds. In this case, the only parties in that position are the airport operators who are the recipients of federal funds under the Trust Fund Acts. Pp. 603–606.

(b) To assert that the economic benefit to airlines from the aid to airports is a form of federal financial assistance ignores the distinction that

Congress made in § 504 that the statute covers only those who receive the aid and does not extend to those who benefit from it. Pp. 606–607.

(c) To tie § 504's scope to economic benefit derived from the Trust Fund expenditures in question here would give § 504 almost limitless coverage. Congress recognized a need to improve airports in order to benefit a wide variety of persons and entities, all of them classified together as beneficiaries, and did not set up a system whereby passengers are the primary or direct beneficiaries and all others, including airlines, benefited by the Trust Fund Acts are indirect recipients of the financial assistance to airports. Pp. 608–610.

(d) The Court of Appeals' attempt to fuse airports and airlines into a single program or activity for purposes of § 504 is unavailing. Regulatory coverage tied to the scope of the intended beneficiaries of the Trust Fund Acts is inconsistent with congressional intent in passing § 504. Pp. 610–611.

(e) Since the air traffic control system is "owned and operated" by the United States, it is not "Federal financial assistance" within the meaning of § 504. Rather, it is a federally conducted program that has many beneficiaries but no recipients. Pp. 611–612.

243 U. S. App. D. C. 237, 752 F. 2d 694, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 613.

Solicitor General Fried argued the cause for petitioners. With him on the briefs were *Assistant Attorney General Reynolds*, *Deputy Solicitor General Kuhl*, *Deputy Assistant Attorney General Disler*, *Kathryn A. Oberly*, and *Miriam R. Eisenstein.*

Douglas L. Parker argued the cause for respondents. With him on the brief were *Arlene Battis* and *Karen Peltz Strauss.**

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*Briefs of *amici curiae* urging reversal were filed for the Air Transport Association of America by *James E. Landry;* for the Equal Employment Advisory Council by *Robert E. Williams*, *Douglas S. McDowell*, and *William S. Franklin;* and for the International Air Transport Association by *Gordon Dean Booth, Jr.*, and *Robert Glasser.*

William C. Gleisner III filed a brief for the National Federation of the Blind as *amicus curiae* urging affirmance.

JUSTICE POWELL delivered the opinion of the Court.

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against handicapped persons in any program or activity receiving federal financial assistance. The United States provides financial assistance to airport operators through grants from a Trust Fund created by the Airport and Airway Development Act of 1970. The Government also operates a nationwide air traffic control system. This case presents the question whether, by virtue of such federal assistance, § 504 is applicable to commercial airlines.[1]

I

Respondents successfully challenged regulations promulgated by the Civil Aeronautics Board (CAB) to implement § 504 of the Rehabilitation Act of 1973, 87 Stat. 390, as amended; 29 U. S. C. § 790 *et seq.* (1982 ed. and Supp. II). To understand respondents' arguments, it is necessary to review the process by which the regulations were promulgated.

A. *The Rulemaking Process*

Section 504 provides:

> "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." 29 U. S. C. § 794.

The statute did not specifically provide for administrative implementation. In 1976, however, the President issued Executive Order No. 11914, 3 CFR 117 (1976–1980), calling on the

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[1] As used herein, the term "airport operator" refers to the various entities that own or manage airports and that have authority to apply for planning or development grants from the Trust Fund. "Commercial airlines" refers to all passenger carriers formerly certificated by the Civil Aeronautics Board.

Secretary of Health, Education, and Welfare[2] to coordinate rulemaking under § 504 by all federal agencies. At that time two federal agencies were principally concerned with aviation: the Federal Aviation Administration (FAA), which is primarily concerned with the Air Traffic Control System and the safety of airline operations, including airports, and CAB, which was primarily concerned with economic regulation of the airline industry.[3] Because § 504 had been modeled after Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.*,[4] both FAA and CAB patterned their proposed rules after the regulations issued to implement Title VI.

1. The Notice of Proposed Rulemaking Under § 504

CAB issued a Notice of Proposed Rulemaking on June 6, 1979.[5] CAB concluded that its authority under § 504 was limited to those few airlines that receive a subsidy under § 406(b) or § 419 of the Federal Aviation Act.[6] CAB announced its intention, however, to go beyond its § 504 jurisdiction in order to regulate the activities of all commercial airlines. CAB relied on its authority under § 404 of the Federal Aviation Act of 1958, 49 U. S. C. App. § 1374.

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[2] This responsibility later was transferred to the Secretary of Health and Human Services when the Department of Health, Education and Welfare was divided into the Department of Education and the Department of Health and Human Services. See The Department of Education Organization Act, Pub. L. 96-88, 93 Stat. 669, codified at 20 U. S. C. § 3401 *et seq.*

[3] The FAA became part of the Department of Transportation (DOT) in 1966. CAB later was disbanded and its functions largely transferred to DOT under the Civil Aeronautics Board Sunset Act of 1984, Pub. L. 98-443, 98 Stat. 1703 *et seq.*

[4] Title VI is the congressional model for subsequently enacted statutes prohibiting discrimination in federally assisted programs or activities. We have relied on case law interpreting Title VI as generally applicable to later statutes. See *Grove City College* v. *Bell*, 465 U. S. 555, 566 (1984); see also S. Rep. No. 93-1297, p. 39 (1974).

[5] Notice of Proposed Rulemaking, Part 382, Nondiscrimination on the Basis of Handicap, 44 Fed. Reg. 32 401 (1979).

[6] 49 U. S. C. App. §§ 1376(b) and 1389 (1982 ed. and Supp. II). Section 406 created a program designed to guarantee the air service necessary to transport mail to small communities. That program was terminated in 1982. In 1978, CAB began operating the "section 419 program" in order to subsidize small community and other essential air service that would not

Section 404 contains two provisions relevant here: § 404(a)(1), requiring all air carriers to "provide safe and adequate service, equipment, and facilities," and § 404(b), prohibiting carriers from "subjecting any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever." CAB explained that "the proposed rules would emphasize that the handicapped are protected by the adequacy of service and antidiscrimination provisions of Section 404 . . . which are applicable to all air carriers, whether or not receiving Federal financial assistance." 44 Fed. Reg. 32401–32402 (1979). Somewhat inexplicably, CAB relied on both provisions of § 404 taken together to support its regulatory authority over the on-board activities of air carriers, even though it was aware that, under the Airline Deregulation Act of 1978,[7] the antidiscrimination provision of § 404(b) would lapse as of Janu-

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otherwise be provided. See Airline Deregulation Act of 1978, Pub. L. 95–504, § 33, 92 Stat. 1732. This program will operate through 1988.

CAB's decision not to regulate the on-board activities of commercial airlines was consistent with administrative practice under Title VI, which prohibits racial discrimination in any program or activity receiving federal financial assistance. None of the agencies concerned with aviation attempted to regulate the on-board activities of commercial airlines under Title VI. Thus, the consistent administrative interpretation of the program-specific language of Title VI and § 504 has been that it does not cover commercial airlines, unless the airline itself received subsidies from CAB. See 14 CFR § 379.2 (1965), 29 Fed. Reg. 19287 (1964) (CAB); 14 CFR § 15.5(c) (1965), 29 Fed. Reg. 19283 (1964) (FAA). That interpretation of the statutes by the agencies charged with their enforcement in the area of aviation is entitled to deference. *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555, 566 (1980).

[7] Pub. L. 95–504, § 40(a), 92 Stat. 1705, 1744 (codified at 49 U. S. C. App. § 1551 (a)(2)(B)).

ary 1, 1983, and only § 404(a)(1), requiring "safe and adequate service," would remain in effect.

2. The Final Regulations

CAB received public comment on the proposed regulations. Several airlines and the Air Transport Association challenged CAB's regulatory jurisdiction over the airlines. In the interim, Executive Order No. 12250, 3 CFR 298 (1981), transferred responsibility for coordinating the administration of various civil rights statutes, including § 504, from the Secretary of Health and Human Services to the Attorney General. After public comment and consultation with the Attorney General, CAB issued final regulations. 14 CFR pt. 382 (1986), 47 Fed. Reg. 25948 *et seq.* (1982).

The regulations have three subparts. Subpart A prohibits discrimination in air transportation against qualified handicapped persons. Subpart B contains specific, detailed requirements that must be followed by all air carriers in providing service to the handicapped. Subpart C sets forth compliance and enforcement mechanisms. As to all three subparts, CAB adhered to its original position that § 504 supported regulatory jurisdiction only over those carriers that receive funds under § 406 or § 419. CAB concluded, however, that the surviving portion of § 404—the "safe and adequate service" clause of § 404(a)(1)—did not support imposition of the specific provisions of subparts B and C on nonsubsidized carriers. Thus, those subparts would apply only to the extent authorized by § 504, that is, to carriers receiving subsidies under § 406 or § 419. CAB concluded, however, that it had authority to extend the reach of subpart A to all air carriers by virtue of § 404(a)(1)'s "safe and adequate service" clause. The Attorney General approved these regulations.

B. *The Court of Appeals Decision*

Respondents Paralyzed Veterans of America and two other organizations representing handicapped individuals ollectively PVA)[8] brought this action in the Court of Apeals for the District of Columbia Circuit. PVA challenged e substance of some of the regulations, as well as CAB's onclusion regarding its rulemaking authority under § 504. nly the latter claim is before us. On that issue, PVA connded that CAB's interpretation of the scope of its ruleaking authority under § 504 was inconsistent with congresonal intent and controlling legal precedent.

The Court of Appeals agreed with PVA's position. *Parazed Veterans of America* v. *CAB*, 243 U. S. App. D. C. 37, 752 F. 2d 694 (1985). In the court's view, § 504 gave AB jurisdiction over all air carriers by virtue of the exensive program of federal financial assistance to airports nder the Airport and Airway Development Act of 1970, 49 . S. C. § 1714, as amended (1976 ed., Supp. V).[9] The ourt of Appeals found an additional source of financial ssistance to airlines in the form of the air traffic control sysem in place at all major airports. The court vacated the egulations to the extent that their application was limited to arriers receiving funds under § 406 or § 419. It instructed OT—CAB's successor agency after CAB was disbanded[10]— issue new regulations that would apply to all commercial irlines.

We granted certiorari to resolve the question of the scope f DOT's regulatory jurisdiction under § 504. 474 U. S. 918 1985). We now reverse.

II

It may be helpful briefly to explain the limited nature of the uestion before us. This case does not present any challenge o CAB's interpretation of the scope of its regulatory jurisiction under § 504. Nor is there any challenge to the application of subpart A—the general antidiscrimination regulation—to all commercial airlines. The only issue before us is the Court of Appeals' conclusion that § 504 applies to commercial airlines as recipients of federal financial assistance.

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[8] The other respondents are the American Council of the Blind and the merican Coalition of Citizens with Disabilities.

[9] The 1970 Act has been replaced with the Airport and Airway Improvenent Act of 1982, 49 U. S. C. App. § 2201 *et seq.*

[10] See n. 3, *supra*.

Section 504 prohibits discrimination against any qualified handicapped individual under "any program or activity receiving Federal financial assistance." We examine first the grants of federal funds to airport operators, which clearly are federal financial assistance, to determine whether it fairly can be said that commercial airlines "receive" these grants.

A

The starting point of any inquiry into the application of a statute is the language of the statute itself. *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 337 (1979). By its terms § 504 limits its coverage to the "program or activity" that "receiv[es]" federal financial assistance. At the outset, therefore, § 504 requires us to identify the recipient of the federal assistance. We look to the terms of the underlying grant statute.

The grant statutes relied on by the Court of Appeals are the Airport and Airway Improvement Act of 1982 (1982 Act), 49 U. S. C. App. § 2201 *et seq.*, and its predecessor statutes, particularly the Airport and Airway Development Act of 1970 (1970 Act), Pub. L. 91–258, 84 Stat. 219 *et seq.* (formerly codified at 49 U. S. C. § 1701 *et seq.* (1976 ed.)). The 1970 Act established the Airport and Airway Trust Fund, appropriations from which are used to fund airport development. The purpose of disbursements from the Trust Fund is to establish "a nationwide system of public airports adequate to meet the present and future needs of civil aeronautics." 84 Stat. 224. Congress directed the Secretary of Transportation to prepare a national airport system plan, *id.*, at 221, and required airport project applications to be consistent with that plan. *Id.*, at 226. In the 1982 Act Congress authorized disbursements from the Trust Fund for the Airport Improvement Program (AIP). Under AIP airport operators submit project grant applications for "airport development or airport planning." 49 U. S. C. App. § 2201(a). Funds are disbursed for a variety of airport construction projects: *e. g.*, land acquisition, 14 CFR § 151.73 (1986); runway paving, § 151.77; and buildings, sidewalks, and parking, § 151.93. The use of the Trust Fund is strictly limited to projects that concern airports. See, *e. g.*, § 151.89 (authorizing road construction) ("Only those airport entrance roads that are definitely needed and are intended only as a way in and out of the airport are eligible").

It is not difficult to identify the recipient of federal financial assistance under these Acts: Congress has made it explicitly clear that these funds are to go to airport operators. Not a single penny of the money is given to the airlines. Thus, the recipient for purposes of § 504 is the *operator* of the airport and not its users.

Congress limited the scope of § 504 to those who actually "receive" federal financial assistance because it sought to impose § 504 coverage as a form of contractual cost of the recipient's agreement to accept the federal funds. "Congress apparently determined that it would require contractors and grantees to bear the costs of providing employment for the handicapped as a *quid pro quo* for the receipt of federal funds." *Consolidated Rail Corporation* v. *Darrone*, 465 U. S. 624, 633, n. 13 (1984). We relied on this same rationale in *Grove City College* v. *Bell*, 465 U. S. 555 (1984), where we noted that the recipient of the federal assistance—the college—was free to terminate its participation in the federal grant program and thus avoid the requirements of Title IX. *Id.*, at 565, n. 13. Under the program-specific statutes, Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision. See *Soberal-Perez* v. *Heckler*, 717 F. 2d 36, 41 (CA2 1983) ("This emphasis upon the contractual nature of the receipt of federal moneys in exchange for a promise not to discriminate is still another reason to conclude that Title VI does not cover direct benefit programs since these programs do not entail any such contractual relationship"), cert. denied, 466 U. S. 929 (1984). By limiting coverage to recipients, Congress imposes the obligations of § 504 upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to "receive" federal funds. In this case, the only parties in that position are the airport operators.

B

Respondents attempt to avoid the straightforward conclusion that airlines are not recipients within the meaning of § 504 by arguing that airlines are "indirect recipients" of the aid to airports. They contend that the money given to airports is simply converted by the airports into nonmoney grants to airlines. Under this reasoning, federal assistance is disbursed to airport operators in the form of cash. The airport operators convert the cash into runways and give the federal assistance—now in the form of a runway—to the airlines. In support of this position, respondents point to the fact that many of the structures constructed at airports with aid from the Trust Fund are particularly beneficial to airlines, *e. g.*, runways, taxiways, and ramps. They also find support for their position in *Grove City*'s recognition that federal financial assistance could be either direct or indirect. This argument confuses intended *beneficiaries* with intended *recipients*. While we observed in *Grove City* that there is no "distinction between direct and indirect aid" and that "[t]here is no basis in the statute for the view that only institutions that themselves apply for federal aid or receive checks directly from the Federal Government are subject to regulation," we made these statements in the context of determining whom Congress intended to receive the federal money, and thereby be covered by Title IX. 465 U. S., at 564. It was clear in *Grove City* that Congress' intended recipient was the college, not the individual students to whom the checks were sent from the Government. It was this unusual disbursement pattern of money from the Government through an intermediary (the students) to the intended recipient that caused us to recognize that federal financial assistance could be received indirectly. While *Grove City* stands for the proposition that Title IX coverage extends to Congress' intended recipient, whether receiving the aid directly or indirectly, it does not stand for the proposition that federal coverage follows the aid past the recipient to those who merely benefit from the aid. In this case, it is clear that the airlines do not actually receive the aid; they only benefit from the airports' use of the aid.

Respondents do not contend that airlines actually receive or are intended to receive money from the Trust Fund. Nor can they argue that the airport operators are, like the students in *Grove City*, mere conduits of the aid to its intended recipient, since, unlike the students, the airports are the intended recipients of the funds. Rather, respondents assert that the economic benefit to airlines from the aid to airports is a form of federal financial assistance. This position ignores the very distinction made by Congress in § 504, and recognized in *Grove City:* The statute covers those who receive the aid, but does not extend as far as those who benefit from it. In *Grove City* we recognized that most federal assistance has "economic ripple effects." We rejected the argument that those indirect economic benefits can trigger statutory coverage. *Id.*, at 572. Congress tied the regulatory authority to those programs or activities that *receive* federal financial assistance; the key is to identify the recipient of that assistance. In this case, it is clear that the recipients of the financial assistance extended by Congress under the Trust Fund are the airport operators.[11]

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[11] This is not to say that Congress could not give federal financial assistance in the form of property improvements, such as a runway. Although the word "financial" usually indicates "money," federal financial assistance

C

By tying the scope of § 504 to economic benefit derived from Trust Fund expenditures, respondents would give § 504 almost limitless coverage. Congress' purpose in passing the Acts and establishing the Trust Fund was to confer economic benefits on a large number of persons and businesses. As the House Committee on Interstate and Foreign Commerce explained:

> "In addition to the actual users of the airport and airway system—such as airline passengers, general aviation, including private and business aviation operations, air freight forwarders, individual corporate and private shippers, etc.—there are others who benefit substantially from aviation; primarily, perhaps, the military should be considered. From a civilian standpoint those who benefit indirectly include the aircraft manufacturers and all of those whose employment is directly or indirectly related to aviation. To illustrate, an aircraft or aircraft component manufacturer may employ thousands of persons who never fly, yet those persons' economic lives depend entirely on aviation. More indirectly, but still to be considered, are those who make their livelihood by providing services for the manufacturers' employees. The employees of such corporations indirectly support such nonaviation interests such as real estate brokers and builders, doctors, dentists, school teachers, etc. This is brought forth here to establish the fact that air transportation in a true sense touches every American home, whether those in the home ever fly or not." H. R. Rep. No. 91-601, p. 6 (1969).

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may take nonmoney form. Cf. *Grove City*, 465 U. S., at 564-565. Again, the relevant starting point is the grant statute. If it extends money, then the recipient for the purposes of § 504 is the entity that receives the money. If the grant statute extends something other than money, then the recipient is the entity that receives whatever thing of value is extended by the grant statute.

Even if the reach of § 504 were limited to those whom Congress specifically intended to benefit, the scope of the statute would be broad indeed, covering whole classes of persons and businesses with only an indirect relation to aviation. The statutory "limitation" on § 504's coverage would virtually disappear, a result Congress surely did not intend.

Respondents contend that distinctions can be drawn among classes of beneficiaries under the 1982 and 1970 Acts. In particular, they assert that the ultimate beneficiaries under the Acts are the passengers, while the economic benefit derived by the airlines is intended to aid the airlines in benefiting the passengers. Section 504 provides no basis for this distinction. Nor can we find a basis in the Trust Fund Acts for preferring passengers over other beneficiaries. Nowhere has Congress expressed a special intent to benefit passengers. Nor has it indicated that the economic benefit to airlines, either because it was more direct or for any other reason, makes them a recipient of federal financial assistance. Rather, Congress recognized a need to improve airports in order to benefit a wide variety of persons and entities, all of them classified together as beneficiaries.[12] Congress did not set up a system where passengers were the primary or direct beneficiaries, and all others benefited by the Acts are indirect recipients of the financial assistance to airports.

In almost any major federal program, Congress may intend to benefit a large class of persons, yet it may do so by fund-ing—that is, extending federal financial assistance to—a limited class of recipients. Section 504, like Title IX in *Grove City*, draws the line of federal regulatory coverage between the recipient and the beneficiary.

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[12] For example, Congress recognized that improved airports would not only satisfy the growing needs of commercial aviation, but also would help foster the significant growth that other areas of civil aviation were experiencing, including air carriers and passengers, air cargo carriers, air taxis, private business flying, and private recreational flying. H. R. Rep. No. 91-601, p. 5 (1969). In short, Congress intended to benefit interstate commerce in general through the means of aiding airports. In the 1970 Act, for example, Congress justified the expenditure because "substantial expansion and improvement of the airport and airway system is *[sic]* required to meet the demands of interstate commerce, the postal service, and the national defense." 84 Stat. 219. The 1982 Act contains a similar statement of purpose. 49 U. S. C. App. § 2201(a)(2).

III

The Court of Appeals found that airports and airlines are "inextricably intertwined" and that the "indissoluble nexus between them is the provision of commercial air transportation." 243 U. S. App. D. C., at 257, 752 F. 2d, at 714. For these reasons, the Court of Appeals concluded that commercial airlines are part of a federally assisted program of "commercial air transportation" because they make use of airports that accept federal funds, and because airports are "indispensable" to air travel.

We find this reasoning overbroad and unpersuasive. The Court of Appeals defined "program or activity" in part by reference to who is benefited by the financial assistance to airports. See *id.*, at 257–258, 752 F. 2d, at 714–715. As shown above, regulatory coverage tied to the scope of the intended benefits of the Trust Fund Acts is inconsistent with congressional intent in passing § 504. We recognized in *Alexander* v. *Choate*, 469 U. S. 287, 299 (1985), that "[a]ny interpretation of § 504 must . . . be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds." The Court of Appeals' reasoning extends § 504 beyond its bounds. Under the Court of Appeals' view various industries and institutions would become part of a federally assisted program or activity, not because they had received federal financial assistance, but because they are "inextricably intertwined" with an institution that has. For example, Congress, with the assistance of the States, has engaged in a mammoth program of interstate highway construction and maintenance. See the Federal-Aid Highway Act of 1956, Pub. L. 627, 70 Stat. 374. Congress in this program used a Trust Fund approach similar to the Airport and Airway Development Act of 1970. If we accepted the Court of Appeals' construction of "program or activity," we would also be compelled to conclude that industries that depend on the federally funded highways for their existence, such as trucking firms and delivery services, are part of a program or activity of national highway transportation. The same could be said of federally supported port facilities. This interpretation of § 504 would give it a scope broader than its language implies, and one never intended by Congress.

The Court of Appeals' reliance on *Grove City* in support of its definition of the relevant program or activity is misplaced. In *Grove City*, despite the arguably "indissoluble nexus" among the various departments of a small college, we concluded that only the financial aid program could be subjected to Title IX. In any analogy between *Grove City* and this case, airport operators would be placed in the position of the college. It is readily apparent that our conclusion in *Grove City* that only a portion of the college was covered by Title IX cannot support the conclusion that commercial air transportation—a concept much larger than the airports—is the program or activity covered by § 504. The Court of Appeals' attempt to fuse airports and airlines into a single program or activity is unavailing. It is by reference to the grant statute, and not to hypothetical collective concepts like commercial aviation or interstate highway transportation, that the relevant program or activity is determined.

IV

The Court of Appeals also held that the federally provided air traffic control system is a form of federal financial assistance to airlines.[13] The Federal Government spends some

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[13] The Court of Appeals concluded that the air traffic control system constituted federal financial assistance, without specifically concluding that the on-board activities of commercial airlines are a program or activity receiving that assistance. Respondents have suggested that we do not need to reach the question whether the air traffic control system is federal

$2 billion annually to run this system 24 hours a day nationwide and in various spots around the world. The air traffic controllers are federal employees, and the Federal Government finances operation of the terminal control facilities. In short, the air traffic control system is "owned and operated" by the United States. For that reason, the air traffic control system is not "federal financial assistance" at all. Rather, it is a federally conducted program that has many beneficiaries but no recipients. The legislative history of Title VI makes clear that such programs do not constitute federal financial assistance to anyone. As then-Deputy Attorney General Katzenbach explained:

> "Activities wholly carried out by the United States with Federal funds, such as river and harbor improvements and other public works, defense installations, veterans' hospitals, mail service, etc., are not included in the list [of federally assisted programs]. Such activities, being wholly owned by, and operated by or for, the United States, cannot fairly be described as receiving Federal 'assistance.' While they may result in general economic benefit to neighboring communities, such benefit is not considered to be financial assistance to a program or activity within the meaning of title VI." 110 Cong. Rec. 13380 (1964).

That reasoning, of course, applies with equal force to § 504. The federal air traffic control system is a public program that does not involve "financial assistance" to anyone.[14]

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financial assistance. We disagree. If we did not reach the issue, then on remand DOT would be required to formulate its policies in accordance with the conclusion of the Court of Appeals.

[14] The Court of Appeals reasoned that the air traffic control system constitutes federal financial assistance because the Federal Government is providing the airlines the services of federal personnel. That reasoning is inconsistent with the longstanding and consistent interpretation of the relevant agencies. FAA, like other agencies, originally promulgated regulations implementing Title VI that defined federal financial assist-

V

The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

The Court starts from the proposition that no federal funds under the Airport and Airway Improvement Act of 1982, 49 U. S. C. App. §2201 *et seq.*, are disbursed directly to com-

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ance in a way that allowed for nonmoney assistance. In its definition section, FAA included among possible forms of federal assistance the "detail of Federal personnel." 14 CFR § 15.23(3) (1965), 29 Fed. Reg. 19286 (1964). DOT's current Title VI regulations use the same phrase. 49 CFR § 21.23(c)(3) (1985). The air traffic control system does not involve the "detail" of federal personnel; there is, in fact, no other air traffic control entity to which federal personnel can be "detailed"—the system is self-contained. In 1978, pursuant to its responsibility to coordinate the implementation of regulations under § 504 by federal agencies, the Department of Health, Education, and Welfare (HEW) published guidelines that substituted the word "services" for "detail." 43 Fed. Reg. 2137. But at the same time HEW explained that it did not intend any substantive change in the definitions:

> "Despite some difference in the wording of the definitions of federal financial assistance in the regulations implementing section 504 and title VI, the substance of the two definitions does not differ." *Id.*, at 2132.

Later, the Department of Justice was given the task of coordinating the regulations under various civil rights laws, including § 504. Exec. Order No. 12250, 3 CFR 298 (1980). It retained the HEW definition of federal financial assistance that included "[s]ervices of Federal personnel." 28 CFR § 41.3(e)(2) (1985). Since the first regulations under Title VI, the interpretation of federal financial assistance has been that the detail, or loan, of federal personnel can constitute federal assistance. "Services" in this context means "detail." No such selection of federal personnel for a particular duty is involved here. The Court of Appeals erred in ignoring this longstanding administrative interpretation. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984). We note that any other interpretation would give almost limitless meaning to the term "federal financial assistance."

mercial airlines. It infers that commercial airlines therefore do not "receive" federal financial assistance. And it concludes that § 504 of the Rehabilitation Act of 1973 is therefore wholly inapplicable to those airlines. That reasoning misperceives the proper inquiry under § 504.

Section 504 provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . ." 29 U. S. C. § 794. The appropriate question is thus not whether commercial airlines "receive" federal financial assistance. Rather, it is whether commercial airlines are in a position to "exclud[e handicapped persons] from the participation in, . . . den[y them] the benefits of, or . . . subjec[t them] to discrimination under" a program or activity receiving federal financial assistance or conducted by an Executive agency. I believe that they are, and I therefore dissent.

I

The Court begins its analysis at the proper place: the underlying grant statute. See Note, 83 Colum. L. Rev. 1210, 1227–1232 (1983). The Airport and Airway Improvement Act of 1982 (Act), which replaced the Airport and Airway Development Act of 1970, Pub. L. 91–258, 84 Stat. 219 *et seq.*, is designed to ensure "the safe operation of the airport and airway system" and to ensure that system's more effective management and utilization. 49 U. S. C. App. §§ 2201(a)(1), (2). To that end, the Act authorizes the Secretary of Transportation to make grants to owners of public-use airports and to certain governmental units for airport development and airport planning. §§ 2204(a), 2208(a). It provides for certain other disbursements to airport owners and to States for the same purposes. §§ 2206, 2207. It authorizes the Secretary to expend other funds for the purposes of acquiring, establishing, and improving air navigation facilities, § 2205(a), and operating and maintaining those facilities, § 2205(c), for associated research and demonstration projects, § 2205(b), and for certain weather reporting services, § 2205(d). The Act finally directs the Secretary to fund the Explosive Detection K-9 Team Training Program for the purpose of detecting explosives at airports and aboard aircraft. § 2225.

The majority never explains the scope of the "program or activity receiving Federal financial assistance or . . . conducted by any Executive agency" that it believes the Act creates. In light of the Court's treatment of the "program or activity" issue in *Grove City College* v. *Bell*, 465 U. S. 555 (1984), I believe that the Act is most naturally viewed as creating "programs" or "activities" relating to the construction and maintenance of safe and efficient airports, and the creation of safe airways. That, however, is not the end of the inquiry.

The next question is whether the Department of Transportation (DOT) has jurisdiction under § 504 to regulate commercial airlines in order to ensure that handicapped individuals are not "excluded from the participation in, . . . denied the benefits of, or . . . subjected to discrimination under" those programs or activities.[1] In my view, the nature of airline transportation demands that DOT have such authority. If commercial airline companies barred the handicapped from traveling on their airlines at all, then that conduct would deny the handicapped the benefits of federally funded and conducted programs and activities relating to the airport and airway system. When commercial airlines allow the handicapped to travel on airlines, but, unreasonably and solely because of their handicap, force them to do so under conditions not substantially equal to those enjoyed by persons who are not handicapped, I believe that there too the airlines discriminatorily deny the handicapped the benefits of federally funded programs or activities supporting the airport and airway system.

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[1] The original rulemaking proceedings in this case were undertaken by the Civil Aeronautics Board (CAB). As the Court explains, *ante*, at 600, n. 3, however, the relevant functions of the CAB were transferred to DOT under the Civil Aeronautics Board Sunset Act of 1984, Pub. L. 98–443, 98 Stat. 1703 *et seq.* See also *Paralyzed Veterans of America* v. *CAB*, 243 U. S. App. D. C. 237, 267, 752 F. 2d 694, 724 (1985).

This result derives from the fact that commercial airlines are in a unique position to deny public access to federally funded airport and airway services. It is true, as the Court points out, that the airport and airway system benefits a wide variety of persons and entities, including some who never fly. See *ante*, at 608–610. At the same time, however, a critical and obvious benefit of the airport and airway system, for members of the general public, is that it allows them to purchase tickets on airlines and to travel from city to city. The vast majority of members of the general public can enjoy that benefit only to the extent allowed, and under conditions set, by commercial airlines. Commercial airlines thus necessarily act as gatekeepers controlling who shall enjoy, and under what conditions, important benefits under federally funded and conducted programs. The airlines' position, as a result, is quite different from that of the trucking firms and delivery services referred to by the majority, *ante*, at 611.[2]

The Civil Aeronautics Board (CAB), in promulgating the rules at issue in this case, apparently relied on an understanding that § 504 gave it no authority whatsoever to regulate the activities of commercial airlines not receiving direct subsidies under §§ 406 or 419 of the Federal Aviation Act, 49 U. S. C. App. §§ 1376, 1389 (1982 ed. and Supp. II). See App. 88a–89a. For the reasons stated above, I believe that that conclusion was in error. I therefore agree with the Court of Appeals that the regulations should be remanded to DOT to be reconsidered in the light of a proper understanding of the agency's authority under § 504.

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[2] The majority ignores this aspect of the question presented by the parties by relying unwaveringly on the fact that, as a general matter, no federal funds are disbursed directly to commercial airlines. The Court, however, has never held that fact dispositive. In *Grove City College* v. *Bell*, 465 U. S. 555 (1984), indeed, on which the majority heavily relies, the federal funds triggering Title IX coverage were not disbursed to Grove City College at all, but to some of its students. We nonetheless found part of the college subject to Title IX. Cf. *Frazier* v. *Board of Trustees of Northwest Mississippi Regional Medical Center*, 765 F. 2d 1278, 1290 (CA5 1985).

II

Were this case to be remanded, it would be appropriate for DOT to proceed upon an additional premise not available to the CAB in its original rulemaking proceeding: that DOT has power, through regulation of *airport operators*, to ensure that commercial airlines do not discriminatorily deprive handicapped persons of the benefits of federal programs supporting the airport and airway system.[3] In order to serve an airport, an air carrier must enter into a lease with the airport operator for the use of airport facilities. DOT has power to direct each federally assisted airport, as part of that lease, to secure from all air carriers serving the airport an assurance of compliance with regulatory standards for service to handicapped persons.[4]

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[3] At the time of the original rulemaking proceeding, the involved federal agencies had apparently agreed that regulation of airlines would be in the hands of the CAB, but that regulation of airport operators would be left to DOT. See 44 Fed. Reg. 31451 (1979). DOT, in fact, postponed its inquiry into whether it should require airport operators, "through their leasing agreements with the airlines," to require the airlines to provide service to the handicapped on a nondiscriminatory basis, because the CAB was considering imposing such regulation on the airlines directly. *Ibid.* At present, DOT exercises jurisdiction over both airlines and airport operators.

[4] DOT officials, at least in the past, have shared this view. See Review of Airline Deregulation and Sunset of the Civil Aeronautics Board (Legislative Proposals Relating to Airline Deregulation and CAB Sunset): Hearings before the Subcommittee on Aviation of the House Committee on Public Works and Transportation, 98th Cong., 2d Sess., 16 (1984) (statement of James Burnley, Deputy Secretary of Transportation) ("I don't

Such a requirement would be a proper exercise of authority under § 504. For the reasons stated above, discrimination by commercial airlines against handicapped persons deprives those persons of equal access to the benefits provided by federally supported airport and airway programs. An airport can properly be considered in violation of § 504 when, through its contractual agreement with the airlines, it perpetuates discrimination against handicapped persons giving those persons unequal access to those programs. See 49 CFR § 27.7 (1985).

III

This case raises important and difficult issues regarding the extent of federal regulatory authority over entities, not themselves direct recipients of federal financial assistance, that nonetheless, in important respects, control the terms of public access to the benefits of such assistance. The majority ignores these issues because it believes that the single question whether commercial airlines are direct "recipients" of federal financial assistance disposes of this case. Because I find the matter more complicated than that, I dissent.

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think there is any question that we would have the authority to require a federally assisted airport in its contracts with carriers, who are given the right to use the facilities at those airports, that they provide that there will be no discrimination against the handicapped"); see also 44 Fed. Reg. 31451 (1979).

OHIO CIVIL RIGHTS COMMISSION ET AL. *v.* DAYTON CHRISTIAN SCHOOLS, INC., ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 85-488. Argued March 26, 1986—Decided June 27, 1986

Appellee Dayton Christian Schools, Inc. (Dayton), a private nonprofit corporation that provides elementary and secondary education, requires that its teachers subscribe to a particular set of religious beliefs, including belief in the internal resolution of disputes through the "Biblical chain of command." As a contractual condition of employment, teachers must agree to present any grievance to their immediate supervisor and to acquiesce in the final authority of Dayton's board of directors, rather than to pursue a remedy in civil court. After a pregnant teacher was told that her employment contract would not be renewed because of Dayton's religious doctrine that mothers should stay home with their preschool age children, she contacted an attorney, who threatened Dayton with litigation under state and federal sex discrimination laws if it did not agree to rehire the teacher for the coming school year. Dayton then rescinded its nonrenewal decision, but terminated the teacher because of her violation of the internal dispute resolution doctrine. The teacher then filed a charge with appellant Ohio Civil Rights Commission, alleging that under Ohio statutes Dayton's original nonrenewal decision constituted unlawful sex discrimination and its termination decision unlawfully penalized her for asserting her rights. Ultimately, the Commission initiated administrative proceedings against Dayton, which answered the complaint by asserting that the First Amendment prevented the Commission from exercising jurisdiction over it since its actions had been taken pursuant to sincerely held religious beliefs. While the administrative proceedings were pending, Dayton and others (also appellees here) filed this action in Federal District Court, seeking an injunction against the state administrative proceedings on the ground that any investigation of Dayton's hiring process or any imposition of sanctions for its nonrenewal or termination decisions would violate the Religion Clauses of the First Amendment. Without addressing the Commission's argument that the court should abstain from exercising its jurisdiction, the District Court refused to issue an injunction, holding, *inter alia*, that the Commission's proposed action would not violate the First and Fourteenth Amendments. The Court of Appeals reversed, holding that the Commission's exercise of jurisdiction would violate both the Free Exercise Clause and the Establishment Clause of the First Amendment.

Held:

1. This Court has appellate jurisdiction over this case under 28 U. S. C. § 1254(2), which authorizes review of a court of appeals' decision holding a state statute unconstitutional as applied to the facts of the case. Here, the Court of Appeals expressly held that the Ohio statutory provisions relied on by the teacher, as applied to authorize the administrative proceedings, were repugnant to the Religion Clauses. P. 625.

2. The District Court should have abstained from adjudicating this case under *Younger* v. *Harris*, 401 U. S. 37, and its progeny. *Younger*, which held that a federal court should not enjoin a pending state criminal proceeding except when necessary to prevent great and immediate irreparable injury, was based on concerns for comity and federalism. Such concerns are equally applicable to other types of state proceedings, including state administrative proceedings, judicial in nature, in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff will have a full and fair opportunity to litigate his constitutional claim. The elimination of prohibited sex discrimination is a sufficiently important state interest to bring the present case within the ambit of the *Younger* doctrine, and there is no reason to doubt that Dayton will receive an adequate opportunity to raise its constitutional claims. Even assuming that Ohio law is such that the Commission may not consider the constitutionality of the statute under which it operates, it is sufficient that under Ohio law constitutional claims may be raised in state-court judicial review of the administrative proceedings. Pp. 625–629.

766 F. 2d 932, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 629.

Kathleen McManus argued the cause for appellants. With her on the briefs were *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, and *Helen M. Ninos*, Assistant Attorney General.

William Bentley Ball argued the cause for appellees. With him on the brief were *Philip J. Murren*, *Sandra E. Wise*, and *Bruce E. Pence*.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Appellee Dayton Christian Schools, Inc. (Dayton), and various individuals brought an action in the United States District Court for the Southern District of Ohio under 42 U. S. C. § 1983, seeking to enjoin a pending state administrative proceeding brought against Dayton by appellant Ohio Civil Rights Commission (Commission). Dayton asserted that the Free Exercise and Establishment Clauses of the First Amendment prohibited the Commission from exercising jurisdiction over it or from punishing it for engaging in employment discrimination. The District Court refused to issue the injunction on grounds that any conflict between the First Amendment and the administrative proceedings was not yet ripe, and that in any case the proposed action of the Commission violated neither the Free Exercise Clause nor the Establishment Clause of the First Amendment, as made applicable to the States by the Fourteenth Amendment. The Court of Appeals for the Sixth Circuit reversed, holding that the exercise of jurisdiction and the enforcement of the statute would impermissibly burden appellees' rights under the Free Exercise Clause and would result in excessive entanglement under the Establishment Clause. We postponed the question of jurisdiction pending consideration of the merits. 474 U. S. 978 (1985). We now conclude that we have jurisdiction, and we reverse, holding that the District Court should have abstained under our cases beginning with *Younger* v. *Harris*, 401 U. S. 37 (1971).

**Joan E. Bertin*, *George Kannar*, *Charles S. Sims*, *Isabelle Katz Pinzler*, and *Burt Neuborne* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Jewish Committee et al. by *Kimberlee Wood Colby*, *Samuel E. Ericsson*, *Michael J. Woodruff*, *Samuel Rabinove*, and *Richard T. Foltin;* for Americans United for Separation of Church and State by *Lee Boothby* and *Robert A. Yingst;* for the Associated Christian Conciliation Services by *John D. Robb;* for the Catholic Conference of Ohio by *David J. Young;* for Concerned Women of America by *Diane E. White*, *Joy R. Powell*, and *Jordan W. Lorence;* for the Council on Religious Freedom by *Lee Boothby* and *Rolland Truman;* for the General Conference of Seventh-day Adventists by *Walter E. Carson* and *Warren L. Johns;* for the Gulf & Great Plains Legal Foundation by *Jerald L. Hill* and *Mark J. Bredemeier;* for the National Jewish Commission on Law and Public Affairs ("COLPA") by *Daniel D. Chazin*, *Nathan Lewin*, and *Dennis Rapps;* for the Rutherford Institute et al. by *W. Charles Bundren*, *Guy O. Farley, Jr.*, *John W. Whitehead*, *D. Kevin Ikenberry*, *Thomas O. Kotouc*, *Alfred Lindh*, *William B. Hollberg*, and *Wendell R. Bird;* and for the United States Catholic Conference by *Wilfred R. Caron* and *Mark E. Chopko*.

Briefs of *amici curiae* were filed for the American Jewish Congress by *Marc D. Stern* and *Ronald A. Krauss;* and for the Catholic League for Religious and Civil Rights et al. by *Steven Frederick McDowell*.

Dayton is a private nonprofit corporation that provides education at both the elementary and secondary school levels. It was formed by two local churches, the Patterson Park Brethren Church and the Christian Tabernacle, and it is regarded as a "nondenominational" extension of the Christian education ministries of these two churches. Dayton's corporate charter establishes a board of directors (board) to lead the corporation in both spiritual and temporal matters. App. 11. The charter also includes a section entitled "Statement of Faith," which serves to restrict membership on the board and the educational staff to persons who subscribe to a particular set of religious beliefs. The Statement of Faith requires each board or staff member to be a born-again Christian and to reaffirm his or her belief annually in the Bible, the Trinity, the nature and mission of Jesus Christ, the doctrine of original sin, the role of the Holy Ghost, the resurrection and judgment of the dead, the need for Christian unity, and the divine creation of human beings. *Id.*, at 5–6.

The board has elaborated these requirements to include a belief in the internal resolution of disputes through the "Biblical chain of command." The core of this doctrine, rooted in passages from the New Testament, is that one Christian should not take another Christian into courts of the State. Teachers are expected to present any grievance they may have to their immediate supervisor, and to acquiesce in the final authority of the board, rather than to pursue a remedy in civil court. The board has sought to ensure compliance with this internal dispute resolution doctrine by making it a contractual condition of employment.

Linda Hoskinson was employed as a teacher at Dayton during the 1978–1979 school year. She subscribed to the Statement of Faith and expressly agreed to resolve disputes internally through the Biblical chain of command. In January 1979, she informed her principal, James Rakestraw, that she was pregnant. After consulting with his superiors, Rakestraw informed Hoskinson that her employment contract would not be renewed at the end of the school year because of Dayton's religious doctrine that mothers should stay home with their preschool age children. Instead of appealing this decision internally, Hoskinson contacted an attorney who sent a letter to Dayton's superintendent, Claude Schindler, threatening litigation based on state and federal sex discrimination laws if Dayton did not agree to rehire Hoskinson for the coming school year.

Upon receipt of this letter, Schindler informed Hoskinson that she was suspended immediately for challenging the nonrenewal decision in a manner inconsistent with the internal dispute resolution doctrine. The board reviewed this decision and decided to terminate Hoskinson. It stated that the sole reason for her termination was her violation of the internal dispute resolution doctrine, and it rescinded the earlier nonrenewal decision because it said that she had not received adequate prior notice of the doctrine concerning a mother's duty to stay home with her young children.

Hoskinson filed a complaint with appellant Ohio Civil Rights Commission (Commission), alleging that Dayton's nonrenewal decision constituted sex discrimination, in violation of Ohio Rev. Code Ann. § 4112.02(A) (Supp. 1985), and that its termination decision penalized her for asserting her rights, in violation of Ohio Rev. Code Ann. § 4112.02(I) (Supp. 1985). The Commission notified Dayton that it was conducting a preliminary investigation into the matter, and repeatedly urged Dayton to consider private settlement, warning that failure to do so could result in a formal adjudication of the matter.

The Commission eventually determined that there was probable cause to believe that Dayton had discriminated against Hoskinson based on her sex and had retaliated against her for attempting to assert her rights in violation of §§ 4112(A) and (I). Pursuant to Ohio Rev. Code Ann. § 4112.05(B) (Supp. 1985), it sent Dayton a proposed Conciliation Agreement and Consent Order that would have required Dayton to reinstate Hoskinson with backpay, and would have prohibited Dayton from taking retaliatory action against any employee for participating in the preliminary investigation. The Commission warned Dayton that failure to accede to this proposal or an acceptable counteroffer would result in formal administrative proceedings being initiated against it. When Dayton failed to respond, the Commission initiated administrative proceedings against it by filing a complaint. Dayton answered the complaint by asserting that the First Amendment prevented the Commission from exercising jurisdiction over it since its actions had been taken pursuant to sincerely held religious beliefs. App. 103.

While these administrative proceedings were pending, Dayton filed this action against the Commission in the United States District Court for the Southern District of Ohio under 42 U. S. C. § 1983, seeking a permanent injunction against the state proceedings on the ground that any investigation of Dayton's hiring process or any imposition of sanctions for Dayton's nonrenewal or termination decisions would violate the Religion Clauses of the First Amendment. App. 118–120. The Commission filed a motion to dismiss, arguing, *inter alia,* that the District Court should refrain from enjoining the administrative proceedings based on federal abstention doctrines. Record, Doc. No. 9, pp. 7–8. It also filed various documents defending its action on the merits.

Without addressing the abstention argument, the District Court refused to issue the injunction. 578 F. Supp. 1004 (1984). The Court of Appeals for the Sixth Circuit reversed, as previously noted, holding that the exercise of such jurisdiction would violate both the Free Exercise Clause and the Establishment Clause of the First Amendment. 766 F. 2d 932 (1985).

We hold that we have appellate jurisdiction under 28 U. S. C. § 1254(2) to review the decision of the Court of Appeals. That statute authorizes an appeal to this Court "by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution." This authority embraces cases holding a state statute unconstitutional as applied to the facts of the case. *Dutton* v. *Evans,* 400 U. S. 74, 76, n. 6 (1970). Here there is no doubt that the decision by the Court of Appeals satisfies this test. The court expressly held that Ohio Rev. Code Ann. § 4112.02 *et seq.* (Supp. 1985) is repugnant to the Free Exercise and Establishment Clauses as applied to authorize the administrative body to investigate the charges against Dayton and to decide whether to impose sanctions. See 766 F. 2d, at 935, n. 5, 944, 955, 961.

Having taken jurisdiction over the decision below, we now turn to whether the District Court should have exercised jurisdiction over the case itself. We conclude that the District Court should have abstained from adjudicating this case under *Younger* v. *Harris,* 401 U. S. 37 (1971), and later cases.[1] The Commission urged such abstention in the District Court, and on oral argument here. Tr. of Oral Arg. 7–8. Dayton has filed a postargument brief urging that the Commission has waived any claim to abstention because it had stipulated in the District Court that that court had jurisdiction of the action. We think, however, that this argument misconceives the nature of *Younger* abstention. It does not arise from lack of jurisdiction in the District Court, but from strong policies counseling against the exercise of such jurisdiction where particular kinds of state proceedings have already been commenced. A State may of course voluntarily submit to federal jurisdiction even though it might have had a tenable claim for abstention. See *Brown* v. *Hotel Employees*, 468 U. S. 491, 500, n. 9 (1984); *Ohio Bureau of Employment Services* v. *Hodory*, 431 U. S. 471, 479–480 (1977); *Sosna* v. *Iowa*, 419 U. S. 393, 396–397, n. 3 (1975). But in each of these cases the State expressly urged this Court or the District Court to proceed to an adjudication of the constitutional merits. We think there was no similar consent or waiver here, and we therefore address the issue of whether the District Court should have abstained from deciding the case.

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[1] We think that any ripeness challenge to appellees' complaint is foreclosed by *Steffel* v. *Thompson,* 415 U. S. 452 (1974), and *Doran* v. *Salem*

In *Younger* v. *Harris*, *supra*, we held that a federal court should not enjoin a pending state criminal proceeding except in the very unusual situation that an injunction is necessary to prevent great and immediate irreparable injury. We justified our decision both on equitable principles, *id.*, at 43, and on the "more vital consideration" of the proper respect for the fundamental role of States in our federal system. *Id.*, at

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Inn, Inc., 422 U. S. 922 (1975). *Steffel* held that a reasonable threat of prosecution for conduct allegedly protected by the Constitution gives rise to a sufficiently ripe controversy. 415 U. S., at 458–460. If a reasonable threat of prosecution creates a ripe controversy, we fail to see how the actual filing of the administrative action threatening sanctions in this case does not. It is true that the administrative body may rule completely or partially in appellees' favor; but it was equally true that the plaintiffs in *Steffel* and *Doran* may have prevailed had they in fact been prosecuted.

44. Because of our concerns for comity and federalism, we thought that it was

> "perfectly natural for our cases to repeat time and time again that the *normal* thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." *Id.*, at 45 (emphasis added).

We have since recognized that our concern for comity and federalism is equally applicable to certain other pending state proceedings. We have applied the *Younger* principle to civil proceedings in which important state interests are involved. *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975); *Juidice* v. *Vail*, 430 U. S. 327 (1977); *Trainor* v. *Hernandez*, 431 U. S. 434 (1977); *Moore* v. *Sims*, 442 U. S. 415, 423 (1979). We have also applied it to state administrative proceedings in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim. We stated in *Gibson* v. *Berryhill*, 411 U. S. 564, 576–577 (1973), that "administrative proceedings looking toward the revocation of a license to practice medicine may in proper circumstances command the respect due court proceedings." Similarly, we have held that federal courts should refrain from enjoining lawyer disciplinary proceedings initiated by state ethics committees if the proceedings are within the appellate jurisdiction of the appropriate State Supreme Court. *Middlesex County Ethics Committee* v. *Garden State Bar Assn.*, 457 U. S. 423 (1982). Because we found that the administrative proceedings in *Middlesex* were "judicial in nature" from the outset, *id.*, at 432–434, it was not essential to the decision that they had progressed to state-court review by the time we heard the federal injunction case.[2]

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[2] The lower courts have been virtually uniform in holding that the *Younger* principle applies to pending state administrative proceedings in which an important state interest is involved. See, *e. g.*, *Williams* v. *Red*

We think the principles enunciated in these cases govern the present one. We have no doubt that the elimination of prohibited sex discrimination is a sufficiently important state interest to bring the present case within the ambit of the cited authorities. We also have no reason to doubt that Dayton will receive an adequate opportunity to raise its constitutional claims. Dayton contends that the mere exercise of jurisdiction over it by the state administrative body violates its First Amendment rights. But we have repeatedly rejected the argument that a constitutional attack on state procedures themselves "automatically vitiates the adequacy of those procedures for purposes of the *Younger-Huffman* line of cases." *Moore*, *supra*, at 427, n. 10. Even religious schools cannot claim to be wholly free from some state regulation. *Wisconsin* v. *Yoder*, 406 U. S. 205, 213 (1972). We therefore think that however Dayton's constitutional claim should be decided on the merits, the Commission violates no constitutional rights by merely investigating the circumstances of Hoskinson's discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge.

Bank Board of Education, 662 F. 2d 1008 (CA3 1981); *Grandco Corp.* v. *Rochford*, 536 F. 2d 197, 206 (CA7 1976); *McCune* v. *Frank*, 521 F. 2d 1152, 1158 (CA2 1975); *McDonald* v. *Metro-North Commuter Railroad Division of Metropolitan Transit Authority*, 565 F. Supp. 37 (SDNY 1983) (Weinfeld, J.). Only the recent case of *Martori Bros. Distributors* v. *James-Massengale*, 781 F. 2d 1349, 1354 (CA9 1986), departs from this position, and it does so without analysis. Of course, if state law expressly indicates that the administrative proceedings are not even "judicial in nature," abstention may not be appropriate. See *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229, 237–239 (1984).

The application of the *Younger* principle to pending state administrative proceedings is fully consistent with *Patsy* v. *Florida Board of Regents*, 457 U. S. 496 (1982), which holds that litigants need not exhaust their administrative remedies prior to bringing a § 1983 suit in federal court. Cf. *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 607–611 (1975). Unlike *Patsy*, the administrative proceedings here are coercive rather than remedial, began before any substantial advancement in the federal action took place, and involve an important state interest.

Dayton also contends that the administrative proceedings do not afford the opportunity to level constitutional challenges against the potential sanctions for the alleged sex discrimination. In its reply brief in this Court, the Commission cites several rulings to demonstrate that religious justifications for otherwise illegal conduct are considered by it. See, *e. g., In re St. Mary of the Falls*, No. 948 (1975). Dayton in turn relies on a decision of the Supreme Court of Ohio, *Mobil Oil Corp.* v. *Rocky River*, 38 Ohio St. 2d 23, 26, 309 N. E. 2d 900, 902 (1974), in which that court held that a local zoning commission could not consider constitutional claims. But even if Ohio law is such that the Commission may not consider the constitutionality of the statute under which it operates, it would seem an unusual doctrine, and one not supported by the cited case, to say that the Commission could not construe its own statutory mandate in the light of federal constitutional principles. Cf. *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490 (1979). In any event, it is sufficient under *Middlesex, supra*, at 436, that constitutional claims may be raised in state-court judicial review of the administrative proceeding. Section 4112.06 of Ohio Rev. Code Ann. (1980) provides that any "respondent claiming to be aggrieved by a final order of the commission . . . may obtain judicial review thereof." Dayton cites us to no Ohio authority indicating that this provision does not authorize judicial review of claims that agency action violates the United States Constitution.

The judgment of the Court of Appeals is therefore reversed, and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, concurring in the judgment.

Appellee Dayton Christian Schools, Inc. (School), employed Mrs. Linda Hoskinson as a teacher. Shortly after learning that she was pregnant, the School refused to renew Mrs. Hoskinson's teaching contract for the next academic year. The two reasons for this decision, according to the School, were (1) the School's belief that Mrs. Hoskinson should remain at home to supervise and care for her forthcoming child; and (2) the School's belief that Mrs. Hoskinson had violated the "Biblical chain of command" by consulting an attorney regarding her disagreement with the School's conviction that she remain at home. App. 115 (complaint of Dayton Christian Schools, Inc., et al.).

After her termination, Mrs. Hoskinson filed a sex discrimination charge against the School with appellant Ohio Civil Rights Commission. The Commission investigated her charge and, upon finding probable cause to believe that the School had violated § 4112.02 of the Ohio Revised Code,[1] scheduled a hearing. The School thereupon filed this action in Federal District Court seeking declaratory and injunctive relief.

In the District Court, the School argued that the Ohio antidiscrimination statute violates the First Amendment Religion Clauses as applied to sectarian schools.[2] The District Court determined that "[t]he only conduct on the part of the Commission that is presently being threatened with sufficient immediacy and reality to present a justiciable controversy is the investigation, which has already taken place, and the pending hearing on the complaint filed by the [Commission] concerning the discharge of Mrs. Hoskinson." 578 F. Supp. 1004, 1029 (SD Ohio 1984). Accord, *id.*, at 1039. On the merits, the District Court concluded that the Commission's investigation and adjudication of sex discrimination charges was constitutional. The court recognized that "the statute *could* be applied in any number of ways that could impermissibly interfere with" appellees' religious freedom, but it concluded that these concerns—which relate to the possible remedies that might or might not be ordered if a violation is found—were "hypothetical or speculative" and therefore not ripe on the current state of the record. *Id.*, at 1028.[3]

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[1] That section provides, in part:

"§ 4112.02 Unlawful discriminatory practices.

"It shall be an unlawful discriminatory practice:

"(A) For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." Ohio Rev. Code Ann. § 4112.02 (Supp. 1985).

[2] The School also argued that § 4112.02 of the Ohio Revised Code is unconstitutional on its face. The District Court held the section to be neither overbroad nor void for vagueness. Because the Court of Appeals invalidated the section as applied to the School, it did not address appellees' facial attack. The School no longer presses the argument that the statute is unconstitutional on its face.

The Court of Appeals reversed. 766 F. 2d 932 (CA6 1985). It recognized that the School "challenge[d] only the [Commission's] exercise of jurisdiction and its issuance of the complaint in this case." *Id.*, at 950, n. 31. It further acknowledged that "an order of reinstatement or backpay is not at issue in this case." *Ibid.* It nevertheless determined that the "chilling knowledge" that the School's selection criteria for teachers "will be reevaluated, and, perhaps, adjusted by the state applying secular criteria" placed an impermissible burden on appellees' religious freedoms. *Ibid.* Looking into the future, the Court of Appeals also concluded that the

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[3] "In permitting the [Commission] to exercise jurisdiction over the instant controversy, the Court has in no way determined either that the full force of [the Commission's] jurisdiction under [Ohio Revised Code] Chapter 4112 can be brought to bear on [Dayton Christian Schools] without impermissibly burdening [appellees'] first amendment rights or, even with respect to the present controversy, that any remedy deemed appropriate by the [Commission] should they find [Dayton Christian Schools] liable, would necessarily present no further first amendment problems. However, because many of the concerns voiced by [appellees] about state encroachment on their religious freedoms remain as yet only possibilities, they cannot serve as the basis for the issuing of a permanent injunction against the [Commission]." 578 F. Supp., at 1041.

"highly intrusive nature" of backpay and reinstatement, as well as the "continuing surveillance implicated by the conciliation agreement proposed by the Commission" and rejected by the School, "reveal the 'significant risk that the First Amendment will be infringed.'" *Id.*, at 942–943 (quoting *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 502 (1979)). Accord, 766 F. 2d, at 951.

Like the majority, I agree with the District Court that neither the investigation of certain charges nor the conduct of a hearing on those charges is prohibited by the First Amendment: "the Commission violates no constitutional rights by merely investigating the circumstances of Hoskinson's discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge." *Ante*, at 628.

I further agree with the District Court that any challenge to a possibly intrusive remedy is premature at this juncture. As the majority points out, *ante*, at 629, the Commission recognizes religious justifications for conduct that might otherwise be illegal. Thus, although § 4112.02 forbids discrimination on the basis of religion, the Commission has dismissed complaints alleging religious discrimination by religious educational institutions, see *Menz* v. *St. Pius School*, No. 3823 (1983), and in particular has dismissed complaints by teachers against sectarian schools for limiting employment to instructors who subscribe to the appropriate faith, see *In re St. Michael's School*, No. 2726 (1976); *In re St. Mary of the Falls*, No. 948 (1975). It bears emphasis that the Commission dismissed these complaints only *after* investigating charges of discrimination, finding probable cause that the statute had been violated, and holding a hearing on the complaint. It therefore follows that the Commission's finding of probable cause and decision to schedule a hearing in this case does not also mean that the Commission intends to impose *any* sanction, let alone a sanction in derogation of the First Amendment's Religion Clauses. In view of this fact, the District

Court was entirely correct in concluding that appellees' constitutional challenge to the remedial provisions of the Ohio statute is not ripe for review.[4] Accordingly, I concur in the judgment.[5]

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[4] I fully agree with the majority's general statement that "a reasonable threat of prosecution for conduct allegedly protected by the Constitution gives rise to a sufficiently ripe controversy." *Ante*, at 626, n. 1 (citation omitted). Thus, when the constitutional challenge is to the arrest and initiation of criminal proceedings—as was the case with the pamphleteer in *Steffel* v. *Thompson*, 415 U. S. 452, 458–460 (1974), and the operators of the bars in *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 930–931 (1975)—a "reasonable threat" of arrest and prosecution is sufficient to make the controversy ripe for judicial review. For purposes of this case, it follows from *Steffel* and *Doran* that appellees' First Amendment challenge to the Commission's decision to investigate and adjudicate a charge of sex discrimination against the School is ripe, because the investigation has been completed and the matter set for hearing.

However, it does not follow that a challenge to whatever *remedy* might ultimately be fashioned (should liability be established and relief ordered) is ripe merely upon a showing of a "reasonable threat" that proceedings will commence. *Doran* and *Steffel* do not suggest this result, for they did not address the constitutionality of possible remedies for the conduct prosecuted in those cases. In view of the absence of any finding of liability in this case, and the Commission's demonstrated willingness to tailor remedies to accommodate the exercise of religious freedoms, there is plainly no "reasonable threat" that an overly intrusive remedy will trench on appellees' First Amendment rights. To hold otherwise would require the District Court to detail the constitutionally permissible range of the Commission's sentencing discretion in advance of any facts regarding the School's discriminatory conduct or any explanation by the Commission justifying the relief it might fashion. Either or both of these items of information would inform the First Amendment analysis and might prove decisive in determining the constitutionality of the Commission's hypothesized remedy.

[5] I do not agree with the majority that the doctrine of abstention associated with *Younger* v. *Harris*, 401 U. S. 37 (1971), required the District Court to dismiss appellees' complaint. That disposition would presumably deny the School a federal forum to adjudicate the constitutionality of a provisional administrative remedy, such as reinstatement pending resolution of the complainant's charges, even though the constitutional issues have become ripe for review by the Commission's entry of a coercive order and

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the Commission refuses to address the merits of the constitutional claims. *Younger* abstention has never been applied to subject a federal-court plaintiff to an allegedly unconstitutional state administrative order when the constitutional challenge to that order can be asserted, if at all, only in state-court judicial review of the administrative proceeding. See *Steffel* v. *Thompson*, 415 U. S., at 462 (holding that *Younger* abstention is inappropriate when no state-court proceeding "is pending at the time the federal complaint is filed," because in that circumstance "federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system"; it cannot "be interpreted as reflecting negatively upon [a] state court's ability to enforce constitutional principles"; and the absence of a pending state-court proceeding deprives "the federal plaintiff [of] a concrete opportunity to vindicate his constitutional rights"). See also *Middlesex County Ethics Committee* v. *Garden State Bar Assn.*, 457 U. S. 423, 437 (1982) (requiring abstention where "an adequate state forum for all relevant issues has clearly been demonstrated to be available prior to any proceedings on the merits in federal court" (citation omitted)).

LYNG, SECRETARY OF AGRICULTURE *v.* CASTILLO ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

No. 85-250. Argued April 29, 1986—Decided June 27, 1986

Eligibility and benefit levels in the federal food stamp program are determined on a "household" rather than an individual basis. The statutory definition of the term "household," as amended in 1981 and 1982, generally treats parents, children, and siblings who live together as a single household, but does not treat more distant relatives, or groups of unrelated persons who live together, as a single household unless they also customarily purchase food and prepare meals together. Appellees are families who generally buy their food and prepare their meals as separate economic units, and who will either lose benefits or have their food stamp allotment decreased as a result of the 1981 and 1982 amendments to the statute. They filed actions that were consolidated in Federal District Court, claiming that the statutory distinction between parents, children, and siblings and all other groups of individuals violates the guarantee of equal treatment in the Due Process Clause of the Fifth Amendment. On cross-motions for summary judgment, the District Court, applying "heightened scrutiny," invalidated the distinction.

Held: The statutory distinction is not unconstitutional. The District Court erred in judging its constitutionality under "heightened scrutiny" since close relatives are not a "suspect" or "quasi-suspect" class. The statutory distinction does not "directly and substantially" interfere with family living arrangements and thereby burden a fundamental right. Judged under the proper standard of review, Congress had a rational basis for making the distinction, since it could reasonably determine that close relatives sharing a home tend to purchase and prepare meals together while distant relatives and unrelated individuals might not be so inclined. Pp. 638–643.

Reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., *post*, p. 643, WHITE, J., *post*, p. 643, and MARSHALL, J., *post*, p. 643, filed dissenting opinions.

Jeffrey P. Minear argued the cause *pro hac vice* for appellant. With him on the brief were *Solicitor General Fried*, *Assistant Attorney General Willard*, and *Deputy Solicitor General Geller*.

Maria Norma Martinez argued the cause for appellees. With her on the brief was *David Hall*.*

JUSTICE STEVENS delivered the opinion of the Court.

Eligibility and benefit levels in the federal food stamp program are determined on a "household" rather than an individual basis. The statutory definition of the term "household," as amended in 1981 and 1982, generally treats parents, children, and siblings who live together as a single household, but does not treat more distant relatives, or groups of unrelated persons who live together, as a single household unless they also customarily purchase food and prepare meals together.[1] Although there are variations in the facts of the four cases that were consolidated in the District Court, they all raise the question whether the statutory distinction between parents, children, and siblings, and all other groups of individuals violates the guarantee of equal treatment in the Due Process Clause of the Fifth Amendment.[2]

**Michael R. Lemov* filed a brief for the Food Research and Action Center et al. as *amici curiae* urging affirmance.

[1] Section 3(i) of the Food Stamp Act of 1964, 78 Stat. 703, as redesignated and amended, 7 U. S. C. § 2012(i), provides in part:

"'Household' means (1) an individual who lives alone or who, while living with others, customarily purchases foods and prepares meals for home consumption separate and apart from the others, or (2) a group of individuals who live together and customarily purchase food and prepare meals together for home consumption; *except that parents and children*, **or siblings**, *who live together shall be treated as a group of individuals who customarily purchase and prepare meals together for home consumption even if they do not do so, unless one of the parents*, **or siblings**, is an elderly or disabled member."

The italicized language was added to the definition by § 101(1) of the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, 95 Stat. 358. The clause extending the proviso to siblings, which appears in boldface, was added by the Omnibus Budget Reconciliation Act of 1982, Pub. L. 97-253, 96 Stat. 772.

[2] "The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's

I

Appellees are families who generally buy their food and prepare their meals as separate economic units; each family will either lose its benefits or have its food stamp allotment decreased as a result of the 1981 and 1982 amendments. Moreover, as appellees' counsel eloquently explained, in each case the loss or reduction of benefits will impose a severe hardship on a needy family, and may be especially harmful to the affected young children for whom an adequate diet is essential.

Appellees accordingly filed these lawsuits to invalidate the 1981 and 1982 amendments and to be treated as separate households for the purpose of determining eligibility and allotment of food stamps. On cross-motions for summary judgment, the District Court considered the merits of appellees' challenge to the constitutionality of the "household" definition.

The District Court was persuaded that the statutory definition had a rational basis. It observed that the amendment made it more difficult for individuals who live together to "manipulate" the rules "so as to obtain separate household status and receive greater benefits"; that the administrative burden of "attempting to make individual household determinations as to 'household' status" was time consuming; and that unrelated persons who live together for reasons of economy or health are more likely "'to actually be separate households'" than related families who live together. App. to Juris. Statement 5a-6a. It held, however, that "a stricter standard of review than the 'rational basis' test" was required. *Id.*, at 7a. Relying primarily on *United States Dept. of Agriculture* v. *Moreno*, 413 U. S. 528, 534 (1973), a

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guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment." *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 100 (1976). Accord, *e. g.*, *United States Dept. of Agriculture* v. *Moreno*, 413 U. S. 528, 533, n. 5 (1973); *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954).

case which it construed as holding that a "congressional desire to harm a politically unpopular group" could not justify the exclusion of household groups which contained unrelated persons, the District Court reasoned that "if the Supreme Court is willing to protect unpopular political groups it should even be more willing to protect the traditional family value of living together." App. to Juris. Statement 8a.

We noted probable jurisdiction, 474 U. S. 994 (1985), and now reverse.

II

The District Court erred in judging the constitutionality of the statutory distinction under "heightened scrutiny." The disadvantaged class is that comprised by parents, children, and siblings. Close relatives are not a "suspect" or "quasi-suspect" class. As a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless. See, *e. g.*, *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 313–314 (1976) *(per curiam)*. In fact, quite the contrary is true.

Nor does the statutory classification "directly and substantially" interfere with family living arrangements and thereby burden a fundamental right. *Zablocki* v. *Redhail*, 434 U. S. 374, 386–387, and n. 12 (1978). See *id.*, at 403–404 (STEVENS, J., concurring); *Califano* v. *Jobst*, 434 U. S. 47, 58 (1977). The "household" definition does not order or prevent any group of persons from dining together. Indeed, in the overwhelming majority of cases it probably has no effect at all. It is exceedingly unlikely that close relatives would choose to live apart simply to increase their allotment of food stamps, for the cost of separate housing would almost certainly exceed the incremental value of the additional stamps. See 50 Fed. Reg. 36641, 36642 (1985). Thus, just as in

United States Dept. of Agriculture v. *Moreno*—the decision which the District Court read to require "heightened scrutiny"—the "legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest." 413 U. S., at 533. See *id.*, at 533–538.[3]

Under the proper standard of review, we agree with the District Court that Congress had a rational basis both for treating parents, children, and siblings who live together as a single "household," and for applying a different standard in determining whether groups of more distant relatives and unrelated persons living together constitute a "household."

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[3] In *United States Dept. of Agriculture* v. *Moreno*, we held that the definition of the term "household" in the Food Stamp Act as amended in 1971, 84 Stat. 2048, was unconstitutional. That definition drew a distinction between households composed entirely of persons who are related to one another and households containing one or more members who are unrelated to the rest. Unlike the present statute, the 1971 definition completely disqualified all households in the latter category. Not only were all groups of unrelated persons ineligible for benefits, but even groups of related persons would lose their benefits if they admitted one nonrelative to their household. We concluded that this definition did not further the interest in preventing fraud, or any other legitimate purpose of the Food Stamp Program.

"Thus, in practical operation, the 1971 amendment excludes from participation in the food stamp program, *not* those persons who are 'likely to abuse the program' but, rather, *only* those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility." 413 U. S., at 538.

The House Committee Report on the Food Stamp Act of 1977 made this reference to the 1971 amendment invalidated in *Moreno:*

"This proviso was essentially an attempt to ban food stamp participation by communal households (so-called 'hippie communes'). In 1973 the Supreme Court in *Moreno* v. *U. S. Department of Agriculture*, 413 U. S. 528, upheld an earlier ruling by a lower court to the effect that this provision was unconstitutional. It had been implemented for only a brief period in a few states." H. R. Rep. No. 95–464, p. 140 (1977).

The 1971 definition was, therefore, "wholly without any rational basis" and "invalid under the Due Process Clause of the Fifth Amendment." 413 U. S., at 538.

As a general matter, the economies of scale that may be realized in group purchase and preparation of food surely justified Congress in providing additional food stamp benefits to households that could not achieve such efficiencies.[4] Moreover, the Legislature's recognition of the potential for mistake and fraud[5] and the cost-ineffectiveness of case-by-case verification of claims that individuals ate as separate households[6] unquestionably warrants the use of general definitions in this area.[7]

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[4] See S. Rep. No. 97–504, p. 24 (1982) ("Because of economics of scale, small (one-, two-, and three-person) households are provided more food stamps per person than larger households. For example, current benefit levels are $70 for 1-, $128 for 2-, $183 for 3-person households"); S. Rep. No. 97–128, p. 31 (1981) ("It should be noted that because of economics of scale, small (one, two, or three persons) households are provided more food stamps per person than larger households—for example, $70 for one, $128 for two, $183 for three, and $233 for four").

[5] See, *e. g.*, S. Rep. No. 97–504, p. 25 (1982) ("Thus, for larger households that are able to fragment into separate, smaller households simply by purchasing and preparing food separately, or claiming to do so, benefits can be significantly increased. In 1981, Congress took a first step toward limiting this potential manipulation of food stamp rules by *requiring* that parents and children living together apply together, except for elderly or disabled parents. This year's Committee proposal would take the next logical step"); H. R. Rep. No. 97–106, pp. 118–119 (1981) ("Currently, the program definition of household states, in part, that a household may consist of an individual or group of individuals who, while living with others, customarily purchase food and prepare meals for home consumption separate and apart from others. This can result in some closely related individuals claiming separate household status for purposes of obtaining food stamp benefits to which they would not otherwise be entitled. For example, an individual over 18 years old, who is living with his parents and has no visible means of support, could be eligible to participate, even though his parents would not be eligible, if the individual were to claim separate household status and indicate that he has zero gross income. The individual could, under existing law, be certified as a separate household, although in fact he was being supported by his parents"); S. Rep. No. 97–128, p. 31 (1981) ("[C]urrent law . . . enables large households to fragment into separate households, result[ing] in increased food stamp benefits"); S. Rep. No. 97–139, pp. 52–53 (1981) ("Under present law, family units may apply as separate households and receive larger benefits if they claim to purchase food and prepare meals separately, even though the children are totally supported by the parents").

The question that remains is whether Congress could accommodate the wishes of distant relatives and unrelated individuals to dine separately without invidiously discriminating against close relatives.[8] The question, in other words, is whether Congress could "[l]imi[t] the availability of the 'purchase and prepare food separately' rule to those most likely to actually be separate households, although living together with others for reasons of economy or health (i. e., [distant relatives and] unrelated persons)." S. Rep. No. 97–504, p. 25 (1982).

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[6] "Limiting the availability of the 'purchase and prepare food separately' rule to those most likely to actually be separate households, although living together with others for reasons of economy or health (i. e., unrelated persons and the elderly or disabled), would place a reasonable control on a situation that State and local administrators have identified as one which r[e]quires congressional action. In fact, tightening of the household definition was the leading recommendation for change made in response to a recent survey by the Committee. Suggestions for revision were received from Alaska, Georgia, Louisiana, North Carolina, Oklahoma, South Carolina, Virginia, Washington, Wyoming, and numerous local administrators, including several who testified before the Committee.

"A further problem with the existing household definition occurs when members of a household 'claim' to purchase and prepare food separately, but, in fact, do not. Verification of a household's claim can be difficult and administratively burdensome as noted in the following examples from State administrators." S. Rep. No. 97–504, pp. 24–25 (1982).

[7] See, *e. g.*, *Califano* v. *Jobst*, 434 U. S. 47, 53 (1977) ("General rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases"); *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970) ("'The problems of government are practical ones and may justify, if they do not require rough accommodations—illogical, it may be, and unscientific'" (quoting *Metropolis Theatre Co.* v. *Chicago*, 228 U. S. 61, 69–70 (1913))). See also, *e. g.*, *Mathews* v. *De Castro*, 429 U. S. 181, 189 (1976); *Weinberger* v. *Salfi*, 422 U. S. 749, 785 (1975).

[8] Although the origin of the distinction is not entirely clear, the Report of the House Agriculture Committee suggests that its decision not to "expan[d] the single household concept to the entire case load, requiring all individuals living in the same home to be treated as one household," was based on its concern over "the impact of the amendment upon various types of living arrangements." H. R. Rep. No. 97–106, p. 256 (1981).

So stated, the justification for the statutory classification is obvious. Congress could reasonably determine that close relatives sharing a home—almost by definition—tend to purchase and prepare meals together while distant relatives and unrelated individuals might not be so inclined. In that event, even though close relatives are undoubtedly as honest as other food stamp recipients, the potential for mistaken or misstated claims of separate dining would be greater in the case of close relatives than would be true for those with weaker communal ties, simply because a greater percentage of the former category in fact prepare meals jointly than the comparable percentage in the latter category. The additional fact that close relatives represent by far the largest proportion of food stamp recipients[9] might well have convinced Congress that limited funds would not permit the accommodation given distant relatives and unrelated persons to be stretched to embrace close relatives as well.[10] Finally,

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[9] Cf. U. S. Dept. of Commerce, Bureau of the Census, Economic Characteristics of Households in the United States: Fourth Quarter 1984, pp. 24, 34 (1986) (statistical table indicating that more than 87% of households receiving food stamps are families related by blood, marriage, or adoption who live and eat together); U. S. Dept. of Commerce, Bureau of the Census, Economic Characteristics of Households in the United States: Third Quarter 1984, pp. 26, 36 (1985) (same); U. S. Dept. of Commerce, Bureau of the Census, Economic Characteristics of Households in the United States: Second Quarter 1984, pp. 26, 36 (1985) (same); U. S. Dept. of Commerce, Bureau of the Census, Economic Characteristics of Households in the United States: First Quarter 1984, pp. 26, 36 (1985) (same).

[10] "[A]n open-ended rule that allows most or all households to fragment simply by changing food purchasing and eating habits is too subject to manipulation." S. Rep. No. 97–504, p. 25 (1982). Even a small percentage of error—given the millions of families involved and the fact that Congress believed that almost all of them could purchase food jointly—could result in the improper expenditure of many millions of dollars. See Budget of the United States Government FY 1985, p. 8–43 (in 1983, ap-

Congress might have reasoned that it would be somewhat easier for close relatives—again, almost by definition—to accommodate their living habits to a federal policy favoring common meal preparation than it would be for more distant relatives or unrelated persons to do so. Because of these differences, we are persuaded that Congress could rationally conclude that the two categories merited differential treatment. Neither the decision to take "one step" in 1981—when the rule was applied to parents and children—nor the decision to take a second step in 1982, when the rule was extended to siblings as well—was irrational because Congress did not simultaneously take a third step that would apply to the entire food stamp program.

The judgment of the District Court is therefore

Reversed.

JUSTICE BRENNAN, dissenting.

I would affirm on the ground that the challenged classifications violate the Equal Protection Clause because they fail the rational-basis test.

JUSTICE WHITE, dissenting.

For the reasons given in the last three paragraphs of JUSTICE MARSHALL's dissenting opinion, the classification at issue in this case is irrational. Accordingly, I dissent.

JUSTICE MARSHALL, dissenting.

This case demonstrates yet again the lack of vitality in this Court's recent equal protection jurisprudence. See, *e. g.*, *Cleburne* v. *Cleburne Living Center*, 473 U. S. 432, 455

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proximately 21 million participants received food stamp assistance valued at nearly $12 billion); U. S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 1985, pp. 122–123 (105th ed.) (same). Congress "expect[ed] that eligibility workers could effectively question claims" of "'separateness'" submitted by distant relatives and unrelated individuals. S. Rep. No. 97–504, p. 26 (1982).

(1985) (MARSHALL, J., concurring in judgment in part and dissenting in part); *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 70 (1973) (MARSHALL, J., dissenting). In my view, when analyzing classifications affecting the receipt of governmental benefits, a court must consider "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification." *Dandridge* v. *Williams*, 397 U. S. 471, 521 (1970) (MARSHALL, J., dissenting). By contrast, the Court's rigid, bipolar approach, which purports to apply rational-basis scrutiny unless a suspect classification is involved or the exercise of a fundamental right is impeded, see *ante*, at 638–639, puts legislative classifications impinging upon sensitive issues of family structure and survival on the same plane as a refusal to let a merchant hawk his wares on a particular street corner. I do not believe the equal protection component of the Due Process Clause could become such a blunt instrument.

The importance of the interests involved in this case can hardly be denied. The Court concludes that the challenged statute does not directly and substantially interfere with family living arrangements, cf. *Moore* v. *East Cleveland*, 431 U. S. 494 (1977) (plurality opinion), because it "does not order or prevent any group of persons from dining together," *ante*, at 638. The Court relies, apparently, on the fact that the statute does not use criminal sanctions, but merely the loss of benefits, to influence family living decisions. It is a bit late in the day, however, to cut off due process analysis—be it procedural or substantive—by simply invoking such a distinction. See *Goldberg* v. *Kelly*, 397 U. S. 254, 262 (1970); *Shapiro* v. *Thompson*, 394 U. S. 618, 627 (1969).

The food stamp benefits at issue are necessary for the affected families' very survival, and the Federal Government denies that benefit to families who do not, by preparing their meals together, structure themselves in a manner that the Government believes will minimize unnecessary expenditures. The importance of that benefit belies any suggestion that the Government is not directly and substantially influencing the living arrangements of families whose resources are so low that they must rely on their relatives for shelter. The Government has thus chosen to intrude into the family dining room—a place where I would have thought the right to privacy exists in its strongest form. What possible interest can the Government have in preventing members of a family from dining as they choose? It is simply none of the Government's business.

The challenged classifications amount to a conclusive presumption that related families living under the same roof do all of their cooking together. Thus the regulation does not merely affect the important privacy interest in family living arrangements recognized in *Moore*, but the even more vital interest in survival. As Congress itself recognized, some separate families live in the same house but cannot prepare meals together because of different work schedules. See S. Rep. No. 97–504, p. 25 (1982). Others may lack sufficient plates and utensils to accommodate more than a few persons at once, or may have only one burner on their stove. These extended families simply lack the option of cooking and eating together. For them, the legislative presumption in this case does far greater damage than merely prescribing with whom they must dine. By assuming that they realize economies of scale that they in fact cannot achieve, the regulation threatens their lives and health by denying them the minimal benefits provided to all other families of similar income and needs.

Balanced against these vital interests is Congress' undeniably legitimate desire to prevent fraud and waste in the food stamp program. The legislative presumption that Congress used, however, is related at best tenuously to the achievement of those goals. While I believe that our standard of review must take into consideration the importance of the individual interests affected, I have some doubt that the classification used here could pass even a rational-basis test. In *United States Dept. of Agriculture* v. *Moreno*, 413 U. S. 528 (1973), we held that a definition of "household" that excluded any living group containing an individual unrelated to any other member of the group did not rationally further the Government's interest in preventing fraud in the food stamp program. Despite the Court's attempts to distinguish this case from *Moreno*, the critical fact in both cases is that the statute drew a distinction that bears no necessary relation to the prevention of fraud. See *id.*, at 535–536 ("denial of essential federal food assistance to *all* otherwise eligible households containing unrelated members" not rationally related to fraud prevention). In the present case, the Government has provided no justification for the conclusion that related individuals living together are more likely to lie about their living arrangements than are unrelated individuals. Nor has it demonstrated that fraudulent conduct by related households is more difficult to detect than similar abuses by unrelated households.

Congress stressed its desire to prevent fraud in the food stamp program, see H. R. Rep. No. 97–687, p. 25 (1982); H. R. Rep. No. 97–106, p. 50 (1981), and it classified the "household consolidation" provision as an antifraud measure. Nevertheless, the Committee Reports cite no hard evidence that related persons living together were in fact significant sources of fraud; the Committees merely determined that the Government could save money by "tighten[ing] the definition of an eligible food stamp household." S. Rep. No. 97–504, at 24. The House did hypothesize, in the course of considering the 1981 amendments, that an 18-year-old child living with his parents could declare himself a separate household for food stamp purposes, H. R. Rep. No. 97–106, at 119. If indeed that abuse widely existed, the resulting legislation, which lumped together all nonelderly parents and their offspring living under one roof as a "household," provided a more than sufficient cure. Nevertheless, Congress proceeded to restrict eligibility even further the following year.

When it moved beyond the rule that merely grouped parents and children, and in the 1982 amendments grouped siblings together as well, Congress interfered substantially with the desires of demonstrably separate families to remain separate families. It did so, moreover, while recognizing that distinct families living together often are genuinely separate households, and that the food stamp program should permit separate families that are not related to live together but maintain separate households. S. Rep. No. 97–504, at 25. Congress nevertheless assumed that related families are less likely to be genuinely separate households than are unrelated families, and failed even to provide related families a chance to rebut the legislative presumption. In view of the importance to the affected families of their family life and their very survival, the Court's extreme deference to this untested assumption is simply inappropriate. I respectfully dissent.

NEW MEXICO *v.* EARNEST

CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

No. 85-162. Argued April 1, 1986—Decided June 27, 1986

103 N. M. 95, 703 P. 2d 872, vacated and remanded.

Paul Bardacke, Attorney General of New Mexico, argued the cause for petitioner. With him on the briefs was *William McEuen*, Assistant Attorney General.

J. Thomas Sullivan argued the cause for respondent. With him on the brief was *Gary C. Mitchell*.*

PER CURIAM.

We vacate the judgment of the Supreme Court of New Mexico and remand for further proceedings not inconsistent with the opinion in *Lee* v. *Illinois*, 476 U. S. 530 (1986).

It is so ordered.

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*A brief of *amici curiae* urging reversal was filed for the State of Indiana et al. by *Linley E. Pearson*, Attorney General of Indiana, *William E. Daily* and *Lisa M. Paunicka*, Deputy Attorneys General, *Robert K. Corbin*, Attorney General of Arizona, *John J. Kelly*, Chief State's Attorney of Connecticut, *Charles M. Oberly*, Attorney General of Delaware, *Richard Opper*, Attorney General of Guam, *Corinne K. A. Watanabe*, Attorney General of Hawaii, *Jim Jones*, Attorney General of Idaho, *Neil F. Hartigan*, Attorney General of Illinois, *William J. Guste, Jr.*, Attorney General of Louisiana, *Mike Greely*, Attorney General of Montana, *Irwin I. Kimmelman*, Attorney General of New Jersey, *Anthony Celebrezze*, Attorney General of Ohio, *Michael Turpen*, Attorney General of Oklahoma, *Travis Medlock*, Attorney General of South Carolina, *W. J. Michael Cody*, Attorney General of Tennessee, *Jim Mattox*, Attorney General of Texas, *David L. Wilkinson*, Attorney General of Utah, *Jeffrey Amestoy*, Attorney General of Vermont, *William G. Broaddus*, Attorney General of Virginia, *Bronson C. La Follette*, Attorney General of Wisconsin, and *Archie G. McClintock*, Attorney General of Wyoming.

Briefs of *amici curiae* urging affirmance were filed for the New Mexico Public Defender Department by *David Stafford* and *Susan Gibbs;* and for the American Civil Liberties Union et al. by *Burt Neuborne* and *Charles S. Sims*.

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JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE O'CONNOR join, concurring.

I agree that the decision of the Supreme Court of New Mexico should be vacated and the case remanded for further consideration in light of *Lee* v. *Illinois*, 476 U. S. 530 (1986). The Supreme Court of New Mexico held that the admission against respondent of an out-of-court statement of a codefendant violated respondent's rights under the Confrontation Clause of the Sixth Amendment. The court believed that *Douglas* v. *Alabama*, 380 U. S. 415 (1965), was "directly on point" and mandated the reversal of respondent's conviction because there had been no opportunity for respondent to cross-examine the codefendant, either at the time the statement was made or at trial. 103 N. M. 95, 98–99, 703 P. 2d 872, 875–876 (1985).

As *Lee* v. *Illinois* makes clear, to the extent that *Douglas* v. *Alabama* interpreted the Confrontation Clause as requiring an opportunity for cross-examination prior to the admission of a codefendant's out-of-court statement, the case is no longer good law. Although *Ohio* v. *Roberts*, 448 U. S. 56 (1980), did not attempt to set forth specific standards for constitutional admissibility applicable to all categories of hearsay, see *United States* v. *Inadi*, 475 U. S. 387, 392–393 (1986), that decision did establish that a lack of cross-examination is not necessarily fatal to the admissibility of evidence under the Confrontation Clause. See *Lee* v. *Illinois*, *supra*, at 543.* In the instant case, therefore, the State is entitled to an opportunity to overcome the weighty

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*For example, in a case in which the State claims that a codefendant's confession is admissible because it "interlocks" with the defendant's confession, *Lee* v. *Illinois* sets out the following test:

"If those portions of the codefendant's purportedly 'interlocking' statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In other words, when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted." 476 U. S., at 545.

presumption of unreliability attaching to codefendant statements by demonstrating that the particular statement at issue bears sufficient "indicia of reliability" to satisfy Confrontation Clause concerns.

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 650 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM JUNE 23 THROUGH JUNE 24, 1986

JUNE 23, 1986

Affirmed on Appeal

No. 85–441. ROBERTS, COMMISSIONER OF LABOR OF THE STATE OF NEW YORK *v.* BURLINGTON INDUSTRIES, INC.; and

No. 85–460. GILBERT ET AL. *v.* BURLINGTON INDUSTRIES, INC. Affirmed on appeals from C. A. 2d Cir. Reported below: 765 F. 2d 320.

No. 85–944. BROOKS, COMMISSIONER OF LABOR OF NORTH CAROLINA *v.* BURLINGTON INDUSTRIES, INC., ET AL. Affirmed on appeal from C. A. 4th Cir. Reported below: 772 F. 2d 1140.

No. 85–1066. MARTIN, GOVERNOR OF NORTH CAROLINA, ET AL. *v.* HAITH. Affirmed on appeal from D. C. E. D. N. C. Reported below: 618 F. Supp. 410.

Appeals Dismissed

No. 84–922. LINEAS AEREAS COSTARRICENSES, S.A., ET AL. *v.* FLORIDA DEPARTMENT OF REVENUE. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 457 So. 2d 1007.

No. 84–1041. AIR JAMAICA LTD. ET AL. *v.* FLORIDA DEPARTMENT OF REVENUE. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 455 So. 2d 324.

No. 85–1690. GOODYEAR FARMS ET AL. *v.* CITY OF AVONDALE. Appeal from Sup. Ct. Ariz. Motion of Arizona for leave to intervene granted. Appeal dismissed for want of substantial federal question. JUSTICE BRENNAN and JUSTICE WHITE would postpone further consideration of the question of jurisdiction to a hearing of the case on the merits. Reported below: 148 Ariz. 216, 714 P. 2d 386.

No. 85-1859. LUNDGARD *v.* OHIO. Appeal from Ct. App. Ohio, Miami County, dismissed for want of substantial federal question.

No. 85-6850. HARDESTY *v.* MICHIGAN. Appeal from Ct. App. Mich. dismissed for want of substantial federal question. Reported below: 139 Mich. App. 124, 362 N. W. 2d 787.

Vacated and Remanded on Appeal

No. 85-1165. NANTAHALA POWER & LIGHT CO. ET AL. *v.* THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. Appeal from Sup. Ct. N. C. Judgment vacated and case remanded for further consideration in light of *Nantahala Power & Light Co.* v. *Thornburg*, 476 U. S. 953 (1986). JUSTICE POWELL and JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 314 N. C. 246, 333 S. E. 2d 217.

No. 85-1307. NANTAHALA POWER & LIGHT CO. ET AL. *v.* THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. Appeal from Sup. Ct. N. C. Judgment vacated and case remanded for further consideration in light of *Nantahala Power & Light Co.* v. *Thornburg*, 476 U. S. 953 (1986). JUSTICE POWELL and JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 314 N. C. 122, 333 S. E. 2d 453.

Certiorari Granted—Vacated and Remanded

No. 85-12. POTT INDUSTRIES, INC. *v.* INGRAM RIVER EQUIPMENT, INC. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *East River S.S. Corp.* v. *Transamerica Delaval Inc.*, 476 U. S. 858 (1986). Reported below: 756 F. 2d 649.

No. 85-406. ARIYOSHI, GOVERNOR OF HAWAII, ET AL. *v.* ROBINSON ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U. S. 172 (1985). Reported below: 753 F. 2d 1468.

Miscellaneous Orders

No. A-944 (85-1975). POLYAK *v.* HULEN ET AL. C. A. 6th Cir. Application for an injunction, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 85-6948. IN RE GAY. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 85-1798. PENNZOIL CO. *v.* TEXACO INC. Appeal from C. A. 2d Cir. Probable jurisdiction noted. Reported below: 784 F. 2d 1133.

Certiorari Granted

No. 85-998. UNITED STATES *v.* DUNN. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 782 F. 2d 1226.

No. 85-1329. YOUNG ET AL. *v.* UNITED STATES EX REL. VUITTON ET FILS S.A. ET AL.; and

No. 85-6207. KLAYMINC *v.* UNITED STATES EX REL. VUITTON ET FILS S.A. ET AL. C. A. 2d Cir. Motion of petitioner in No. 85-6207 for leave to proceed *in forma pauperis* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 780 F. 2d 179.

No. 85-1358. LUKHARD, COMMISSIONER, VIRGINIA DEPARTMENT OF SOCIAL SERVICES *v.* REED ET AL. C. A. 4th Cir. Motion of respondents Reed et al. for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 774 F. 2d 1270.

Certiorari Denied

No. 84-1808. WHITE, DBA BLUE WAVE OYSTER CO., ET AL. *v.* M/V TESTBANK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 752 F. 2d 1019.

No. 84-1966. CWT FARMS, INC., ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari denied. Reported below: 755 F. 2d 790.

No. 85-873. CAMACHO ET AL. *v.* BUNYAN. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 773.

No. 85-929. SLACK ET AL. *v.* BURLINGTON INDUSTRIES, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 772 F. 2d 1140.

No. 85-1030. RADOL ET AL. *v.* THOMAS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 772 F. 2d 244.

No. 85-1301. HASTINGS, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA *v.* JUDICIAL CONFERENCE OF THE UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 248 U. S. App. D. C. 180, 770 F. 2d 1093.

No. 85-1491. BELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 776 F. 2d 965.

No. 85-1503. WATTENBARGER *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 21 M. J. 41.

No. 85-1528. HUBBLE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 509 Pa. 497, 504 A. 2d 168.

No. 85-1540. PRACHT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 2d 703.

No. 85-1594. INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES & MOVING PICTURE MACHINE OPERATORS OF UNITED STATES AND CANADA ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 779 F. 2d 552.

No. 85-1609. HASTINGS, UNITED STATES DISTRICT JUDGE, ET AL. *v.* GODBOLD, CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 783 F. 2d 1488.

No. 85-1628. PAYNE, INDEPENDENT EXECUTOR OF THE ESTATE OF JOHNSTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 2d 1123.

No. 85-1648. CALIFORNIA HOSPITAL ASSN. ET AL. *v.* HENNING, LABOR COMMISSIONER, DIVISION OF LABOR STANDARDS ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 856 and 783 F. 2d 946.

No. 85-1650. N. O. C., T/A NOBLE OIL CO. *v.* ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY. C. A. 3d Cir. Certiorari denied. Reported below: 782 F. 2d 1030.

No. 85-1674. NADWORNY *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 396 Mass. 342, 486 N. E. 2d 675.

No. 85-1676. McKEE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 781 F. 2d 1043.

No. 85-1713. DRUM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 783 F. 2d 1179.

No. 85-1761. HOLYOKE WATER POWER CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari denied. Reported below: 778 F. 2d 49.

No. 85-1766. MOSS *v.* MUNICIPAL COURT OF THE NORTH ORANGE COUNTY JUDICIAL DISTRICT (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85-1770. GIBSON ET AL. *v.* AT&T TECHNOLOGIES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 782 F. 2d 686.

No. 85-1780. BIC LEISURE PRODUCTS, INC., ET AL. *v.* WINDSURFING INTERNATIONAL, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 782 F. 2d 995.

No. 85-1793. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* SMITH. C. A. 11th Cir. Certiorari denied. Reported below: 777 F. 2d 609.

No. 85-1803. SLAB FORK COAL CO. *v.* UNITED VIRGINIA BANK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 784 F. 2d 1188.

No. 85-1808. DAVIS *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 85-1811. OHIO DEPARTMENT OF NATURAL RESOURCES *v.* SPIERS, TRUSTEE. C. A. 6th Cir. Certiorari denied. Reported below: 780 F. 2d 585.

No. 85-1817. AVERY *v.* JENNINGS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 233.

No. 85-1846. SHELTON ET AL. *v.* CITY OF COLLEGE STATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 780 F. 2d 475.

No. 85-1875. SCHUCHMAN ET UX. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 779 F. 2d 54.

No. 85-1898. WAGNER ET AL. *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 783 F. 2d 1042.

No. 85-1899. DAVID *v.* DEFENSE LOGISTICS AGENCY. C. A. Fed. Cir. Certiorari denied. Reported below: 776 F. 2d 1065.

No. 85-1900. EAKES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 783 F. 2d 499.

No. 85-1917. BILLS ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 786 F. 2d 1145.

No. 85-1919. PARNESS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 779 F. 2d 820.

No. 85-1920. BATSON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 782 F. 2d 1307.

No. 85-5901. CLIFTON *v.* MCCARTHY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 774 F. 2d 1173.

No. 85-6418. ISSA *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 790 F. 2d 90.

No. 85-6535. WILSON ET AL. *v.* HUDSON COUNTY PROSECUTORS OFFICE ET AL. C. A. 4th Cir. Certiorari denied.

No. 85-6550. OWENS *v.* LOPEZ, REGIONAL COMMISSIONER, UNITED STATES PAROLE COMMISSION, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 5.

No. 85-6581. SOHAPPY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 770 F. 2d 816.

No. 85-6595. METZGER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 778 F. 2d 1195.

No. 85-6602. GARY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 499 A. 2d 815.

No. 85-6616. FERNANDEZ ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 778 F. 2d 1558.

No. 85-6626. GATES *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 493 So. 2d 410.

No. 85-6667. BOAG *v.* RICKETTS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 780 F. 2d 1025.

No. 85-6819. MCCONNELL *v.* WEE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 786 F. 2d 1171.

No. 85-6824. NORTH *v.* EDWARDS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 785 F. 2d 309.

No. 85-6826. SELLNER *v.* PANAGOULIS, AKA HUDNALL, ET AL. Ct. App. Md. Certiorari denied. Reported below: 304 Md. 631, 500 A. 2d 649.

No. 85-6833. LACY *v.* DISTRICT COURT OF DALLAS COUNTY, TEXAS. C. A. 5th Cir. Certiorari denied.

No. 85-6839. OTIS *v.* SEARS, ROEBUCK & CO. C. A. 7th Cir. Certiorari denied. Reported below: 785 F. 2d 312.

No. 85-6840. WALTER *v.* DICKSON ET AL. C. A. 5th Cir. Certiorari denied.

No. 85-6843. BRYANT *v.* VOSE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION. C. A. 1st Cir. Certiorari denied. Reported below: 785 F. 2d 364.

No. 85-6845. TOLER *v.* NEW HANOVER COUNTY BOARD OF EDUCATION. C. A. 4th Cir. Certiorari denied.

No. 85-6851. DAIGRE *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 785 F. 2d 1033.

No. 85-6853. FOWLER ET AL. *v.* JAGO, SUPERINTENDENT, LONDON CORRECTIONAL INSTITUTION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 787 F. 2d 589.

No. 85-6854. PLIES *v.* LAZARE ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85-6855. TATU ET AL. *v.* LAWSON & HARTNELL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 85-6856. HENDERSON *v.* IDAHO ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 110 Idaho 308, 715 P. 2d 978.

No. 85-6857. WRENN *v.* ST. CHARLES HOSPITAL. C. A. 6th Cir. Certiorari denied. Reported below: 786 F. 2d 1167.

No. 85-6862. CAMACHO *v.* RITZ-CARLTON WATER TOWER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 786 F. 2d 242.

No. 85-6914. DE ROSA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 783 F. 2d 1401.

No. 85-6962. GEORGALIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 788 F. 2d 5.

No. 85-6967. CABLE *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 65 Md. App. 493, 501 A. 2d 108.

No. 85-6971. EBERWINE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 779 F. 2d 1088.

No. 85-6984. CASTANEDA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 85-6985. TANNOUS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 785 F. 2d 1.

No. 85-6989. GIAQUINTO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 787 F. 2d 584.

No. 85-6995. MEANS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 787 F. 2d 598.

No. 84-1907. KAISER ALUMINUM & CHEMICAL CORP. ET AL. *v.* BONJORNO ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 752 F. 2d 802.

No. 85-6871. BRANTLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 786 F. 2d 1322.

No. 85-1579. BOGGILD ET AL. *v.* KENNER PRODUCTS, A DIVISION OF CPG PRODUCTS CORP. C. A. 6th Cir. Motion of American Intellectual Property Law Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 776 F. 2d 1315.

No. 85-1653. BALISTRIERI ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari limited to Question II presented by the petition. Reported below: 778 F. 2d 1226.

No. 85-1664. ALABAMA *v.* CROWE. Sup. Ct. Ala. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 485 So. 2d 373.

No. 85-1683. CITY OF PHOENIX *v.* WEST PUBLISHING CO. Ct. App. Ariz. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 148 Ariz. 31, 712 P. 2d 944.

No. 85-1792. BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES *v.* RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD CO. C. A. 4th Cir. Certiorari before judgment denied.

No. 85-6523. PHILLIPS, AKA BASHIR *v.* TEXAS. Ct. Crim. App. Tex.;
No. 85-6545. JAMES *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla.;
No. 85-6696. MATHENIA *v.* MISSOURI. Sup. Ct. Mo.;
No. 85-6963. JONES *v.* MISSOURI. Sup. Ct. Mo.; and
No. 85-6974. PEEDE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 85-6523, 701 S. W. 2d 875; No. 85-6545, 484 So. 2d 1235; No. 85-6696, 702 S. W. 2d 840; No. 85-6963, 705 S. W. 2d 19; No. 85-6974, 474 So. 2d 808.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 84-1942. NATIONWIDE MUTUAL INSURANCE CO. *v.* CLAY, 476 U. S. 1101;
No. 85-695. ILLINOIS CENTRAL GULF RAILROAD CO. *v.* COLEMAN, 476 U. S. 1104;
No. 85-1020. GELLERT *v.* EASTERN AIR LINES, INC., 475 U. S. 1036;
No. 85-1362. STERN ET AL. *v.* TARRANT COUNTY HOSPITAL DISTRICT ET AL., 476 U. S. 1108; and
No. 85-1464. NEWKIRK ET AL. *v.* BIGARD, INDIVIDUALLY AND DBA B & B OIL CO., ET AL., 475 U. S. 1140. Petitions for rehearing denied.

No. 85-6507. KELLER *v.* PETSOCK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER, ET AL., 475 U. S. 1143;

No. 85-6548. RYAN *v.* STEPHEN, 476 U. S. 1107;

No. 85-6674. IN RE DYSON, 476 U. S. 1111;

No. 85-6686. MORGAN *v.* UNITED STATES, 476 U. S. 1122; and

No. 85-6702. IN RE MUELLER, 476 U. S. 1113. Petitions for rehearing denied.

JUNE 24, 1986

Certiorari Denied

No. 85-7182 (A-1000). BOWDEN *v.* KEMP, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. Certiorari denied. Reported below: 793 F. 2d 273.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and the petition for writ of certiorari, and would vacate the death sentence in this case.

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CIVIL RIGHTS ACT OF 1871.

Damages—"Value" or "importance" of constitutional right.—Damages based on abstract "value" or "importance" of constitutional rights are not a permissible element of compensatory damages in cases under 42 U. S. C. § 1983—such as respondent teacher's suit to recover damages for violations of his due process rights and First Amendment right to academic freedom allegedly resulting from his suspension because of his teaching methods in

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a seventh-grade life science course that included showing of allegedly sexually explicit pictures and films. Memphis Community School Dist. v. Stachura, p. 299.

CIVIL RIGHTS ACT OF 1964.

Sexual harassment—"Hostile environment" claim.—A claim of "hostile environment" sexual harassment—not limited to "economic" or "tangible" discrimination—is a form of sex discrimination that is actionable under Title VII of Act; employers are not automatically liable for sexual harassment committed by their supervisory personnel. Meritor Savings Bank v. Vinson, p. 57.

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CONFESSIONS. See **Constitutional Law, V, 1.**

CONSTITUTIONAL LAW. See also **Civil Rights Act of 1871; Civil Rights Attorney's Fees Awards Act of 1976; Criminal Law; Habeas Corpus; Jurisdiction; Mootness.**

I. Commerce Clause.

1. *Prohibition of importation of baitfish—State statute.*—Where (1) appellee bait dealer was indicted for federal crime of transporting fish in violation of state law after he arranged to have live baitfish imported into Maine, despite a Maine statute prohibiting such importation, (2) he sought dismissal on ground that Maine statute unconstitutionally burdened interstate commerce, and Maine intervened to defend statute's validity, and (3) District Court upheld statute but Court of Appeals reversed, Maine properly invoked this Court's jurisdiction under 28 U. S. C. § 1254(2), which is not limited to civil litigation; Maine statute was constitutional. Maine v. Taylor, p. 131.

2. *State aviation fuel tax—Pre-emption.*—Florida's tax on aviation fuel sold within State to airlines regardless of whether fuel was used to fly

CONSTITUTIONAL LAW—Continued.

within or without State—challenged by Canadian airline operating charter flights to and from United States—did not violate Commerce Clause; nor was tax pre-empted by Federal Aviation Act, which does not occupy field of international aviation. Wardair Canada Inc. v. Florida Dept. of Revenue, p. 1.

II. Cruel and Unusual Punishment.

Death penalty—Insanity of prisoner.—Eighth Amendment prohibits a State from inflicting death penalty upon a prisoner who becomes insane after sentencing. Ford v. Wainwright, p. 399.

III. Due Process.

Visible possession of firearm—Sentencing factor.—A State may, consistent with due process, treat visible possession of a firearm during commission of certain felonies as a sentencing consideration to be proved by only a preponderance of evidence, rather than as an element of offense that must be proved beyond a reasonable doubt; nor does such a state statute, that provides for sentencing by judge, rather than by jury, violate Sixth Amendment guarantee of a jury trial. McMillan v. Pennsylvania, p. 79.

IV. Equal Protection of the Laws.

Food Stamp Act of 1964—Eligibility and benefit levels.—Equal protection guarantee is not violated by distinction under Food Stamp Act of 1964 whereby—for purposes of determining eligibility and benefit levels—parents, children, and siblings who live together are treated as a "household," but more distant relatives, or groups of unrelated persons, who live together are not so treated unless they also customarily purchase food and prepare meals together. Lyng v. Castillo, p. 635.

V. Right to Counsel.

1. *Accused's incriminating statements—Cellmate informant.*—Respondent's incriminating statements made while incarcerated prior to trial to his cellmate, another inmate who had agreed to act as an informant and who obeyed police instructions only to listen to respondent and not to question him about crimes charged, were not inadmissible at respondent's state-court trial on ground that they were obtained in violation of respondent's Sixth Amendment right to counsel. Kuhlmann v. Wilson, p. 436.

2. *Ineffective assistance—Illegal search and seizure—Failure to seek pretrial suppression.*—Where (1) during respondent's state trial that resulted in a rape conviction, defense counsel sought to suppress introduction of a bedsheet taken from respondent's bed by a police officer acting without a warrant, (2) judge ruled that suppression motion was untimely, rejecting counsel's attempted justification of his omission, (3) appellate

CONSTITUTIONAL LAW—Continued.

court rejected respondent's claim of ineffective assistance of trial counsel, and (4) Federal District Court granted habeas corpus relief on basis of such claim, rule against habeas corpus relief for Fourth Amendment claim that could have been litigated in state courts did not extend to Sixth Amendment ineffective-assistance claim founded primarily on incompetent representation with respect to a Fourth Amendment issue; although respondent satisfied "incompetence" portion of test for ineffective-assistance claim, District Court should determine whether respondent met "prejudice" portion. Kimmelman v. Morrison, p. 365.

VI. Taking of Property.

1. *Land use regulations—Validity.*—Where (1) appellant's proposal to subdivide property into residential lots was rejected by appellee county's officials, (2) appellant filed a state-court suit alleging that officials restricted property to agricultural use by denying all subdivision applications and thereby appropriated property's economic use for a public, open-space buffer, and (3) trial court sustained a demurrer to complaint and appellate court affirmed, this Court—absent County Planning Commission's authoritative determination as to how it would apply certain regulations to appellant's property—could not determine whether a "taking" occurred or whether county failed to provide "just compensation," and thus Court could not adjudicate constitutionality of regulations purporting to limit development. MacDonald, Sommer & Frates v. Yolo County, p. 340.

2. *Social Security Act—State employees—Withdrawal from coverage.*—A taking of a State's property within meaning of Fifth Amendment was not effected by Social Security Act's provisions relating to a State's withdrawal from elective coverage of employees of State and its political subdivisions under Social Security System. Bowen v. Public Agencies Opposed to Social Security Entrapment, p. 41.

CRIMINAL LAW. See **Constitutional Law,** I–III, V; **Habeas Corpus.**

Death penalty—Exclusion of venireman—Prosecution's improper argument—Assistance of counsel.—In petitioner's state-court trial that resulted in convictions for murder, robbery, and assault with intent to kill, in jury's recommendation of death sentence, and in judge's imposition of such sentence, record supported (1) judge's decision to exclude a venireman for cause because of his views opposing death penalty, (2) rejection of contention that prosecution's improper remarks in closing argument during trial's guilt phase rendered trial so unfair as to violate due process, and (3) rejection of petitioner's claim of ineffective assistance of counsel at trial's sentencing phase. Darden v. Wainwright, p. 168.

DAMAGES. See **Civil Rights Act of 1871; Civil Rights Attorney's Fees Awards Act of 1976; Death on the High Seas Act.**

DEATH ON THE HIGH SEAS ACT.

Recovery of nonpecuniary damages—Pre-emption of state law.—Where federal-court actions sought to recover damages based on deaths of passengers in helicopter that crashed in high seas off Louisiana coast, Act applied, rather than Outer Continental Shelf Lands Act, and pre-empted Louisiana wrongful-death statute so as to preclude recovery of nonpecuniary damages thereunder. Offshore Logistics, Inc. v. Tallentire, p. 207.

DEATH PENALTY. See **Constitutional Law,** II; **Criminal Law.**

DISCOVERY OF VICTIM'S STATEMENTS BY ACCUSED. See **Habeas Corpus,** 1.

DISCRIMINATION AGAINST HANDICAPPED PERSONS. See **Rehabilitation Act of 1973.**

DISCRIMINATION AGAINST INTERSTATE COMMERCE. See **Constitutional Law,** I, 1.

DISCRIMINATION BASED ON SEX. See **Civil Rights Act of 1964; Jurisdiction.**

DISCRIMINATION IN EMPLOYMENT. See **Civil Rights Act of 1964; Jurisdiction.**

DISTRICT COURTS. See **Jurisdiction.**

DUE PROCESS. See **Civil Rights Act of 1871; Constitutional Law,** III; **Criminal Law; Habeas Corpus,** 1.

EIGHTH AMENDMENT. See **Constitutional Law,** II.

ELIGIBILITY FOR FOOD STAMPS. See **Constitutional Law,** IV.

ELIGIBILITY FOR MEDICAID. See **Social Security Act.**

EMINENT DOMAIN. See **Constitutional Law,** VI, 1.

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1964; Constitutional Law,** VI, 2; **Jurisdiction.**

EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964; Jurisdiction.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** IV; **Mootness.**

EVIDENCE. See **Constitutional Law,** III; V, 1; **Habeas Corpus,** 2; **Libel,** 2.

EXPOSURE TO ASBESTOS. See **Federal Rules of Civil Procedure.**

FEDERAL AVIATION ACT. See **Constitutional Law,** I, 2.

FEDERAL INCOME TAX. See **Internal Revenue Code.**

FEDERAL RULES OF CIVIL PROCEDURE. See also **Libel, 1; Trade Act of 1974.**

Wrongful-death action—Summary judgment.—In a wrongful-death action alleging that decedent's death resulted from his exposure to asbestos products of petitioner corporation, which moved for summary judgment on ground that respondent administratrix failed to produce any discovery evidence to show decedent's exposure to petitioner's products, Court of Appeals' position that summary judgment for petitioner was precluded because of petitioner's failure to support its motion with evidence tending to negate such exposure was erroneous under Rule 56. Celotex Corp. v. Catrett, p. 317.

FEDERAL-STATE RELATIONS. See **Constitutional Law,** I; VI, 2; **Death on the High Seas Act; Jurisdiction.**

FIFTH AMENDMENT. See **Constitutional Law,** IV; VI; **Mootness.**

FIREARMS. See **Constitutional Law,** III; **Mootness.**

FIRST AMENDMENT. See **Civil Rights Act of 1871; Jurisdiction.**

FLORIDA. See **Constitutional Law,** I, 2; II.

FOOD STAMP ACT OF 1964. See **Constitutional Law,** IV.

FOREIGN COMMERCE. See **Constitutional Law,** I, 2.

FOURTEENTH AMENDMENT. See **Constitutional Law,** III.

FOURTH AMENDMENT. See **Constitutional Law,** V, 2.

FREEDOM OF RELIGION. See **Jurisdiction.**

FUEL TAXES. See **Constitutional Law,** I, 2.

GOVERNMENT EMPLOYEES. See **Constitutional Law,** VI, 2.

GROUP INSURANCE PROGRAMS. See **Internal Revenue Code.**

HABEAS CORPUS.

1. *State prisoner—Defense counsel's state-court procedural default.*—A federal habeas corpus petitioner cannot show cause for a procedural default in state-court proceedings by establishing that competent defense counsel's failure to raise a substantive claim of error was inadvertent rather than deliberate; thus, respondent, who was convicted in state proceedings, could not, in federal habeas corpus proceedings, show cause for a procedural default in state-court proceedings where (1) state judge denied defense counsel's pretrial motion to discover victim's statements to police, (2) defense counsel filed a petition for appeal that failed to include a claim based on such ruling, (3) after appeal was denied, respondent filed a *pro se* state habeas corpus petition, claiming he had been denied due process by prosecution's withholding of victim's statements, which petition was denied because respondent had failed to raise claim on direct appeal, (4) respond-

HABEAS CORPUS—Continued.

ent filed a *pro se* habeas petition in Federal District Court, which also held that discovery claim was barred by such procedural default, and (5) on appeal, respondent disavowed any claim of ineffective assistance of counsel, but asserted that counsel had mistakenly omitted discovery claim from state petition for appeal. Murray v. Carrier, p. 478.

2. *State prisoner—Psychiatrist's testimony—Claim not asserted on appeal.*—Where (1) prior to petitioner's state-court trial for murder of a woman, he was examined by a court-appointed psychiatrist at defense counsel's request, (2) petitioner told psychiatrist that he once tore clothes off a girl on a school bus before deciding not to rape her, (3) after petitioner was convicted, prosecution called psychiatrist at sentencing phase and, over defense's objection, he described school-bus incident, (4) on appeal, defense counsel did not assign any error concerning admission of psychiatrist's testimony because state law did not then support his position, and (5) State Supreme Court affirmed conviction and sentence, not addressing any issues concerning psychiatric testimony, federal habeas corpus relief was precluded because petitioner had defaulted his underlying constitutional claim as to psychiatrist's testimony by failing to press it on direct appeal. Smith v. Murray, p. 527.

HANDICAPPED PERSONS. See **Rehabilitation Act of 1973.**

HELICOPTER CRASHES. See **Death on the High Seas Act.**

"HOSTILE ENVIRONMENT" SEXUAL HARASSMENT. See Civil **Rights Act of 1964.**

"HOUSEHOLD" FOR WELFARE BENEFIT PURPOSES. See **Constitutional Law,** IV.

INCOME TAXES. See **Internal Revenue Code.**

"INDISPENSABLE" PARTIES. See **Trade Act of 1974.**

INFORMANTS. See **Constitutional Law,** V, 1.

INSANITY AS PRECLUDING DEATH PENALTY. See **Constitutional Law,** II.

INTERNAL REVENUE CODE.

Income tax—Charitable organization—Group insurance for members.—Insurance program of respondent American Bar Endowment, a charitable organization which raised money for its charitable work by providing low-cost group insurance to its members, was a "trade or business" subjecting profits from program to unrelated business income tax under Code, and members were not entitled to treat portions of their premium payments as charitable contributions. United States v. American Bar Endowment, p. 105.

INTERSTATE COMMERCE. See **Constitutional Law,** I, 1.

JURISDICTION. See **Constitutional Law,** I, 1.

Abstention—Parochial school teacher's discharge—State administrative proceedings.—Where (1) after a pregnant parochial school teacher was told that her contract would not be renewed because of respondent employer's religious doctrine that mothers should stay at home with their preschool age children, her attorney threatened litigation under state and federal sex discrimination laws, (2) employer rescinded its nonrenewal decision, but terminated teacher because of her breach of a contract requirement that all disputes be resolved internally rather than through court actions, (3) teacher filed a sex discrimination charge with State Civil Rights Commission, which initiated administrative proceedings against employer, and (4) employer filed an action in Federal District Court, which denied injunction against administrative proceedings, holding that such proceedings would not violate employer's First Amendment religious rights, District Court should have abstained from adjudicating case. Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., p. 619.

JURY TRIAL. See **Constitutional Law,** III; **Criminal Law.**

JUST COMPENSATION CLAUSE. See **Constitutional Law,** VI.

LABOR UNIONS' STANDING TO SUE FOR MEMBERS. See **Trade Act of 1974.**

LAND USE REGULATIONS. See **Constitutional Law,** VI, 1.

LIBEL.

1. *Diversity actions—Statute of limitations.*—Where (1) petitioners' diversity libel actions were filed in District Court on May 9, 1983, based on a story in May 31, 1982, issue of Fortune Magazine, (2) registered agent of Time received complaints on May 23, 1983, but refused service because Time was not named as a defendant, (3) on July 19, 1983, petitioners amended complaints to name as defendant "Fortune, also known as Time, Incorporated," and (4) amended complaints were served on Time on July 21, such complaint amendments did not relate back to May 9 filing, and actions were properly dismissed under applicable New Jersey statute requiring that a libel action be started within one year of alleged libel's publication. Schiavone v. Fortune, p. 21.

2. *Summary judgment—Actual malice—Evidentiary standard.*—In a libel action subject to rule of *New York Times Co.* v. *Sullivan,* 376 U. S. 254, a trial court ruling on defendant's summary judgment motion must be guided by "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists; plaintiff may not defeat defendant's properly supported motion without offering any concrete evi-

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dence from which a reasonable jury could return a verdict for plaintiff and by merely asserting that jury might disbelieve defendant's denial of actual malice. Anderson v. Liberty Lobby, Inc., p. 242.

LIMITATIONS PERIODS. See **Libel,** 1.

MAINE. See **Constitutional Law,** I, 1.

MASSACHUSETTS. See **Social Security Act.**

MEDICAID. See **Social Security Act.**

"MEDICALLY NEEDY" PERSONS. See **Social Security Act.**

MENTAL PATIENTS. See **Mootness.**

MOOTNESS.

Former mental patients—Purchase of firearms—Amendment of statute.—Where (1) appellee, a former involuntarily committed mental patient, was unable to purchase a firearm because of 18 U. S. C. § 922(d), which also applies to felons, (2) § 925(c) allowed certain felons, but not former mental patients, to apply for administrative relief from disability imposed by federal firearms laws, and (3) District Court upheld appellee's challenge to statutory scheme as violating equal protection principles and as unconstitutionally creating an irrebuttable presumption that a mental patient was forever mentally ill and dangerous, such issues became moot when, after this Court noted probable jurisdiction and heard arguments, Congress amended § 925(c) to apply to former mental patients. Department of Treasury v. Galioto, p. 556.

NEW JERSEY. See **Libel,** 1.

OUTER CONTINENTAL SHELF LANDS ACT. See **Death on the High Seas Act.**

PAROCHIAL SCHOOL TEACHERS. See **Jurisdiction.**

PARTIES. See **Trade Act of 1974.**

POLICE INFORMANTS. See **Constitutional Law,** V, 1.

POSSESSION OF FIREARMS. See **Constitutional Law,** III.

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See **Constitutional Law,** I, 2; **Death on the High Seas Act.**

PRISONERS. See **Constitutional Law,** II.

PSYCHIATRIST'S TESTIMONY. See **Habeas Corpus,** 2.

PUBLIC EMPLOYEES. See **Constitutional Law,** VI, 2.

PURCHASE OF FIREARMS BY FORMER MENTAL PATIENTS. See **Mootness.**

REHABILITATION ACT OF 1973.

Commercial Airlines—Application of Act.—Section 504 of Act, which prohibits discrimination against handicapped persons in federally funded programs, is not applicable to commercial airlines, since they do not "receive" any federal funds even though they may benefit from federal aid to airports. Department of Transportation v. Paralyzed Veterans of America, p. 597.

"RELATION BACK" OF PLEADING AMENDMENTS. See **Libel,** 1.

RELIGIOUS FREEDOM. See **Jurisdiction.**

RESIDENCE SEARCHES. See **Constitutional Law,** V, 2.

RIGHT TO COUNSEL. See **Constitutional Law,** V; **Criminal Law; Habeas Corpus.**

RIGHT TO JURY TRIAL. See **Constitutional Law,** III; **Criminal Law.**

SEARCHES AND SEIZURES. See **Constitutional Law,** V, 2.

SEX DISCRIMINATION. See **Civil Rights Act of 1964; Jurisdiction.**

SIXTH AMENDMENT. See **Constitutional Law,** III; V, 2.

SOCIAL SECURITY ACT. See also **Constitutional Law,** VI, 2.

Medicaid—Eligibility determination.—Act's "spenddown" and "same methodology" provisions with regard to determinations by States participating in Medicaid program as to eligibility of "medically needy" were not violated by Massachusetts' 6-month spenddown period for calculating income of medically needy. Atkins v. Rivera, p. 154.

STANDING TO APPEAL. See **Constitutional Law,** I, 1.

STANDING TO SUE. See **Trade Act of 1974.**

STATE TAX ON AVIATION FUEL. See **Constitutional Law,** I, 2.

STATUTES OF LIMITATIONS. See **Libel,** 1.

SUMMARY JUDGMENTS. See **Federal Rules of Civil Procedure; Libel,** 2.

SUPREME COURT. See **Constitutional Law,** I, 1.

"TAKING" OF PROPERTY. See **Constitutional Law,** VI.

TAXES. See **Constitutional Law,** I, 2; **Internal Revenue Code.**

TEACHERS. See **Jurisdiction.**

TRADE ACT OF 1974.

Program for laidoff workers—Union's standing to sue.—A union had standing, on behalf of its members, to litigate an action challenging Secretary of Labor's interpretation of Act's eligibility provisions regarding benefits to workers laid off because of competition from imports; action can be maintained without joinder as defendants of state agencies administering benefit program. Automobile Workers v. Brock, p. 274.

UNIONS' STANDING TO SUE FOR MEMBERS. See **Trade Act of 1974.**

WELFARE BENEFITS. See **Constitutional Law, IV; Social Security Act.**

WORDS AND PHRASES.

"Household." § 3(i), Food Stamp Act of 1964, 7 U. S. C. § 2012(i). Lyng v. Castillo, p. 635.

WRONGFUL-DEATH ACTIONS. See **Death on the High Seas Act; Federal Rules of Civil Procedure.**

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